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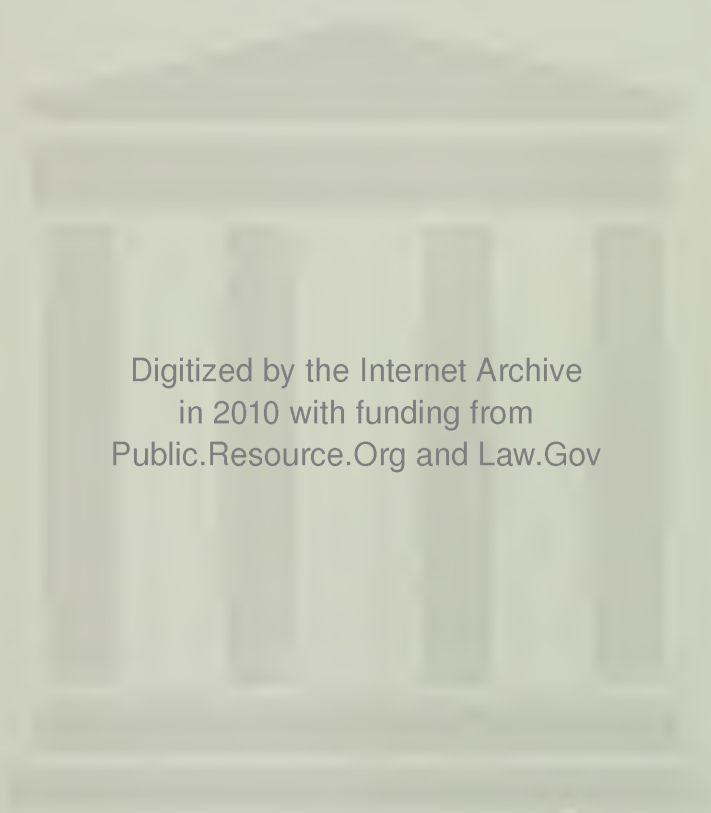
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No. 16357

VOL. 3106

United States
Court of Appeals
for the Ninth Circuit

JOHN N. SEAVER, JR.,

Appellant.

vs.

UNITED STATES PLYWOOD CORPORA-
TION,

Appellee.

Transcript of Record

In Two Volumes

FILED

MAY 19 1959

Volume II PAUL P. O'BRIEN, CLERK

(Pages 247 to 507)

Appeal from the United States District Court
for the District of Oregon.

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Appeal from the United States District Court
for the District of Oregon.

(Testimony of Marvin T. Warlick.)

Q. (By Mr. Dezendorf): Mr. Warlick, do you recall giving a statement concerning your intention with regard to how long it would take to remove the timber from your property and what Mr. Davidson told you about it to Mr. Hoffman in his office in October of 1956?

A. I don't remember any of the details, sir. I remember talking with Louie about it.

Q. You don't recall writing out in your own handwriting a statement concerning this matter which Mr. Hoffman then had typed up from your notes and you signed?

A. Well, as I say, I remember signing something, but what was in it I don't remember.

Q. You don't remember writing it out in long-hand and his having it copied and then your signing it?

A. No; I would say that I don't remember.

Q. Do you remember at that time and place in Mr. Hoffman's office telling him that Mr. Davidson assured you that when the logging started it would not take long to finish the job and [197] would be completed in a matter of a few months, after which their rights and interests would cease?

A. I would have to review the statement, sir. As I say, I couldn't tell you what was in it now.

Q. And you don't recall that statement that I just indicated?

A. Well, if it's in it, it's substantially correct.

Q. And whatever you told him at that time was your then best recollection of the true situation, is that correct?

(Testimony of Marvin T. Warlick.)

A. I would think so, yes.

Mr. Dezendorf: May I have Exhibit 30, please?
May I open it to take out a different document?

The Court: Yes.

Mr. Dezendorf: Mark that as 30-A, please.

(At this point a typewritten document dated October 29th, 1956, signed by Marvin T. Warlick, was marked for Identification as Plaintiff's Exhibit 30-A.)

Mr. Dezendorf: Hand it to the witness.

(Whereupon the Crier did as requested.)

Q. (By Mr. Dezendorf): Mr. Warlick, will you read that, please? A. All right, sir.

(Whereupon the witness did as requested.)

Q. (By Mr. Dezendorf): Is that your signature on the document? A. It is, sir. [198]

Q. Is that the statement that you gave to Mr. Hoffman in his office on the date it bears?

A. It is, sir.

Q. And is it a true statement?

A. It is, sir.

Mr. Dezendorf: I will offer it in evidence.

The Court: All right. Admitted.

(At this point the document dated October 29, 1956, signed by Marvin T. Warlick, previously marked for Identification as Plaintiff's Exhibit 30-A, was thereupon received in evidence.)

Mr. Dezendorf: No further questions.

Mr. Biggs: May I have just a minute, your Honor?

The Court: Yes.

Mr. Biggs: No questions.

The Court: That's all.

(Witness excused.)

Mr. Biggs: Call Mr. A. S. Davidson.

The Court: Do either one of you want Mr. Warlick again?

Mr. Dezendorf: The only information is the cruise he was to produce.

Mr. Warlick: Yes, sir. If I have the papers they are up in my lumber office on 29 West 11th right here in town. [199]

The Court: Oh fine. That's just splendid. Mr. Warlick, would you please make a search of your papers as soon as possible? We are going to be at Fenton Hall on the University of Oregon campus. Do you know where that is?

Mr. Warlick: Yes, sir.

The Court: It's Room, I think 27.

Mr. Biggs: Isn't it on the main floor, your Honor?

The Court: It's right next to the library.

Mr. Warlick: I will find it.

The Court: Would you mind coming back this afternoon, in any event?

Mr. Warlick: I will make the search in ten or fifteen minutes and——

Mr. Biggs: You don't have to do it right now.

Mr. Warlick: All right. I will sit back here.

Mr. Biggs: Over the noon hour would give you enough time.

Mr. Warlick: Yes.

Mr. Biggs: Mr. Davidson, would you take the stand? [200]

ARTHUR SHERMAN DAVIDSON

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Biggs:

Q. Mr. Davidson, where do you reside?

A. Mapleton.

Q. Mapleton, Oregon?

A. Mapleton, Oregon.

Q. How long have you lived at Mapleton, Oregon?

A. Since '42. My family moved there in '42. I was there in '39 off and on.

Q. What is your present occupation?

A. Well, I suppose you would call me a lumberman.

Q. You are semi-retired at the moment?

A. Just at the moment.

Q. What? A. At the moment.

The Court: I don't understand that. What does that mean?

Mr. Biggs: Well, the lumber industry isn't just what it should be, I think, is what he referred to.

(Testimony of Arthur Sherman Davidson.)

Q. Although you do have sons and others in your family who are actually engaged in the operation of your business? A. Yes. That's right. [201]

Q. Yes. You say a lumberman. What are your activities, precisely? What kind of lumber activities are you engaged in?

A. Well, sawmill. We have a sawmill.

Q. You own and operate a sawmill at Mapleton?

A. That's right.

Q. What is the name of that sawmill?

A. Davidson Industries, Inc.

Q. What kind of timber are you using in that sawmill, all species?

A. No, not all, but fir, Douglas Fir, Hemlock, Spruce and occasionally some cedar.

Q. How long have you owned and operated that mill, Mr. Davidson?

A. Well, going into the fourth year.

Q. When you say you came into the Mapleton area in '38 or '39, from what part of the country did you come? A. Puget Sound.

Q. How long had you lived in the Puget Sound area? A. Oh, fifty-one or -two years.

Q. That is your native state, is it, Washington?

A. I was born in South Dakota.

Q. Yes. But most of your adult life was spent in Washington prior to coming to Oregon?

A. That's right. [202]

Q. What business were you engaged in up there? A. Logging.

Q. By logging do you mean that you were buy-

(Testimony of Arthur Sherman Davidson.)

ing tracts of timber which you were logging out or you were engaged on contract to cut timber from other people's lands?

A. No. We bought our own timber and logged it.

Q. Yes. And what kind of timber were you dealing with? A. Mostly fir.

Q. Yes. What grades of fir, types of fir, species?

A. All types.

Q. Old-growth, second-growth fir?

A. That's right. What they call red fir and yellow fir.

Q. Those colors that have been referred to in connection with describing timber; old-growth, generally, is referred to as yellow fir, and second-growth, red fir, or is that too simple a classification?

A. I would hate to get into an argument about that.

Q. All right. Most of your life, then, you have spent in the fir industry, is that correct?

A. That's right.

The Court: Do you want to qualify him as an expert?

Mr. Biggs: Yes, your Honor.

The Court: You have admitted he is an expert. Or he should be after these years.

Q. (By Mr. Biggs): Now, did you have a specific purpose in [203] mind in coming to Oregon?

A. Oh, yes.

Q. What? In connection with the logging business, I mean, or the lumbering business?

A. To obtain timber, of course. Timber in Wash-

(Testimony of Arthur Sherman Davidson.)

ington that was obtainable was getting really scarce. We came down here because it was more plentiful here and easier to get hold of.

Q. When you left Washington what type of—were you operating a sawmill up there at that time? A. No.

Q. Just logging? Logging and selling logs?

A. Logs and piling.

Q. And piling. Now, what kind of timber with respect to old-growth or second-growth fir were you dealing in up there?

A. Both. Both fir, old-growth and second-growth. For the piling, mostly second-growth.

Q. What is piling? What do you mean by piling?

A. That's the tree that they cut down and trim, generally peel—not all—and use to drive under a dock or a bridge. For instance, one order that we filled we sent out two shiploads to go to the Oakland Bay Bridge in San Francisco. We shipped lots of piles to Japan. At that time the Japanese market was good. We sent many a shipload to Japan.

Q. Can you keep your voice up a little bit? Perhaps if I may come a little closer, your Honor—just go ahead—I [204] didn't mean to interrupt you—with your statement.

A. I was all through.

The Court: I think he finished his answer on the piling.

Mr. Biggs: I see.

Q. Was that a substantial part of your busi-

(Testimony of Arthur Sherman Davidson.)

ness in Washington, the manufacture or the production of second-growth logs?

A. A substantial part?

Q. Yes, sir.

A. Yes, sir; at least 50 per cent.

Q. And the poles, you say, were all second-growth, is that correct?

A. Not all, but mostly.

Q. Mostly?

A. There were some type of piling for which they required second-growth.

Q. Yes. A. And——

Q. What other products were—manufactured products at that time were being marketed in that area or abroad or in California, or served by that section of the country with second-growth timber or from second-growth timber?

A. Oh, at that time, of course, second-growth was manufactured into lumber just the same as anything else, as far as that goes. Perhaps a little lower price than the old-growth, but still it [205] was used all the time for lumber.

Q. Was there any considerable demand for ties, bridge decking, and so on?

A. Ties—lots of ties.

Q. Those are just ordinary ties that the railroads use? A. That's right.

Q. Yes. What were they manufactured out of, principally, Mr. Davidson?

A. Well, two types of ties. The sawmill, if they cut a tie, they will cut it out of either old-growth

(Testimony of Arthur Sherman Davidson.)

or second-growth. Generally it's a poorer grade of log. We also sold hewed ties.

The Court: What kind?

The Witness: Hewed ties.

The Court: Hewed ties?

The Witness: Yes. Men would go into the woods with a broad ax and smooth off two faces of log, take a small tree, hew it off on each side with a broad ax and saw it into eight-foot lengths and sell it for ties.

Q. (By Mr. Biggs): And how large a tree would it take to produce that kind of a tie?

A. The average tie had to be eight inches through.

Q. At what point, top or stump or breast-high or——

A. I mean the tie itself had to be eight inches through.

Q. Oh. The tie had to be eight inches [206] through?

A. And it would also have to have either six or an eight-inch face so that it would take a tree large enough to flatten off six inches on each side. It would be eight inches through.

Q. How long would the tie have to be?

A. Eight feet.

Q. Eight——

A. Eight feet is the shortest.

Q. So that when we are speaking of Douglas Fir it was a relatively small tree could produce ties, is that correct? A. Right.

(Testimony of Arthur Sherman Davidson.)

Q. Yes, sir. Now, when you came into Oregon in 1938 or '9 will you state what your activities were with respect to acquiring timber? A. What?

Q. What timber did you acquire, if any, when you came into Oregon in 1938 to '39?

A. Well, we bought a tract——

Q. Pardon?

A. We bought a tract at Mapleton.

The Court: I don't know who "we" is.

Mr. Biggs: Yes.

Q. I said yourself; if you were not acting alone——

A. Well, at the time I came I represented Davidson Brothers Logging Company, which was just myself and my brother. I purchased in our name a tract of timber that was cruised at [207] 203,-000,000 feet.

Q. 203,000,000 feet?

A. Yes. 203,000,000 feet bought from McKenzie River Timber Company in the name of Davidson Brothers Logging Company. Immediately afterwards we went in with some other gentlemen and incorporated as the Siuslaw Forest Products.

Q. Now, will you identify the other gentlemen?

A. There was myself and my brother.

Q. Yes, sir.

A. Two gentlemen who operated on Puget Sound by the name of McKee and Lewis, Joe Lewis and Paul McKee. There was four people from Northwest Door Company, a man by the name of

(Testimony of Arthur Sherman Davidson.)

Herman Tensil, who is President of the Northwest Door Company. I can't think of——

Q. Gonyea?

A. Henry Gonyea and Ed Eisenhower. But I can't think of the fourth man.

Q. Well, that's sufficient. They were mostly, with the exception of you and your brother, residents of Washington, is that correct?

A. That's right.

Q. All right. You acquired, then, this one tract of timber and then when you say "we" you are speaking of the Siuslaw Forest Products——

A. Yes. [208]

Q. ——subsequently acquired other tracts?

A. That's right.

Q. Now, by 1942 what timber did Davidson Logging Company or Siuslaw Forest Products own in the Mapleton area? A. Well——

Q. Not tract by tract, but generally what areas? How extensive were those?

A. We owned this 203,000,000——

Q. Yes.

A. ——that we had purchased. And it's so far back I can't keep in mind the exact dates that we purchased the others and which tracts we purchased first. But altogether in there I think up to the time we probably had 240,000,000.

Q. Do you know where the Warlick tract of timber was located, Mr.—— A. Oh, yes.

Q. ——Yes. Now, by 1942 had your other holdings extended to the Seaver tract? A. Yes.

(Testimony of Arthur Sherman Davidson.)

Q. Were you actually logging in those other holdings? A. Yes.

Q. How far would they be from the Seaver tract?

A. The holdings or the logging?

Q. Yes. What you were logging.

A. Oh, I think probably we were within four miles of their [209] line.

Mr. Biggs: Yes.

The Court: Just one second. I notice Mr. Husband is talking to Mr. Warlick. And it's perfectly all right to talk to him about this other——

Mr. Biggs: The cruise?

The Court: The cruise. But I don't know whether you propose to interrogate Mr. Warlick concerning that other contract or not. If so——

Mr. Dezendorf: I do not.

The Court: Well, then, you can talk to him about anything you want. If you were going to, I was going to ask him not to talk to him. All right.

Mr. Husband: I was just going to make—tell him that we had inquired from Mr. Hooker about the cruise. I thought maybe he might——

The Court: You can talk about anything you want now.

Mr. Husband: But Mr. Hooker couldn't find the cruise either.

Mr. Biggs: Mr. Warlick says he thinks now that he has it.

Mr. Husband: I was telling him that he couldn't get it from Hooker.

Q. (By Mr. Biggs): Had your holdings ex-

(Testimony of Arthur Sherman Davidson.)

tended to the Warlick tract by 1942, Mr. [210] Davidson?

A. Yes. The original piece that was bought during the Warlick's tract.

Q. And you say your logging show at that time was about four miles airline from the Warlick tract?

A. I think right towards that. We were within four miles.

Q. Yes. And you mean by that that you had a logging road that would have to be extended about four miles to reach the Seaver tract; is that correct? A. Yes.

Q. Did you then have in operation a mill, Mr. Davidson?

A. If it was not in operation, it was nearly so. I couldn't place the exact date that we started to operate. It will be brought out here.

Q. Were you doing any second-growth logging at that time? A. Yes.

Q. Yes. Were you manufacturing the second-growth or were you selling the logs?

The Court: Is that in Oregon?

Mr. Biggs: Yes, your Honor. This is Mapleton that he is talking about.

The Court: You were cutting second-growth in what year?

Mr. Biggs: At the time.

Q. '42?

A. We had cut it in '41 already then.

Mr. Biggs: '41. The question, your Honor, was what he [211] was doing at the time.

(Testimony of Arthur Sherman Davidson.)

The Court: I think that that is going to be very difficult to hear. Why don't we recess now and we might have better——

Mr. Biggs: Acoustics.

The Court: Yes. All right. Now, let me see if we have everything that is here. Will all those persons who are under subpoena or who are here at Mr. Biggs' request or Mr. Dezendorf's request please go to Fenton Hall, Room 27, I believe it would be, and be there a little before 1:30? We are going to take up sharply at that time. All right. We will recess until 1:30 to Fenton Hall.

(At this point the Court adjourned for the noon recess at 11:55 a.m.) [212]

Afternoon Session

(At this point the Court reconvened at 1:30 p.m. pursuant to the noon recess, and further proceedings herein were had as follows:)

Mr. Biggs: I would like to recall Mr. Warlick for a question or two, your Honor, at this time.

MARVIN T. WARLICK

was thereupon recalled as a witness in behalf of the Defendant, and, having been previously duly sworn, was examined and testified further as follows:

Further Direct Examination

By Mr. Biggs:

Q. Mr. Warlick, in the course of your testimony this morning you stated that you thought that you had a copy of the Hooker cruise or some cruise that you had had made of this timber prior to its actual sale in 1942, and you said you thought you had it among your papers here in Eugene and you would make a search for it over the noon hour. Have you made such a search and failed to find anything on the case? Do you know where else it might be among your effects, if you still have it?

A. I am sure I do not have it because if I did have it it [213] would be in that particular drawer.

Mr. Biggs: You may cross-examine.

Cross-Examination

By Mr. Dezendorf:

Q. Did you try to call Mr. Hooker to find out if he had a copy? A. No.

Mr. Dezendorf: That's all.

The Court: All right. Well, then, Defendant's Motion to strike the testimony of Mr. Warlick with reference to the cruise is denied and the evidence is now admitted.

Mr. Biggs: Fine. You may step aside, Mr. Warlick.

(Witness excused.)

Mr. Biggs: Mr. Davidson, resume the stand.

The Court: You have a quizzical look. Do you want to take an exception?

Mr. Dezendorf: I don't need one.

Mr. Biggs: I was going to say this: That if Mr. Dezendorf implies by his question that he is not satisfied with the search I can put a witness who has investigated the matter with Mr. Hooker and who was unable to locate the cruise——

Now, if you are going to make any subsequent point of it, I would rather make that showing in the record at this [214] time.

Mr. Dezendorf: I was searching my mind because, as I view it, the mere fact that this particular witness, Mr. Warlick, does not have a copy of the cruise should not be sufficient evidence to let in secondary evidence unless there is a further showing that the original, which is the best evidence, or copy of it, or something, is not available.

The Court: I thought that wasn't necessary in view of the fact that Mr. Husband stated this morning that he had called Mr. Hooker and had attempted to get the cruise and Mr. Hooker had informed him that no such cruise was available. What is your name?

Mr. Biggs: Biggs is my name at the moment, your Honor.

The Court: Mr. Biggs had made an identical

statement. I thought the record was sufficient on that point. But if you want any sworn testimony——

Mr. Biggs: Let's put Mr. Husband on. It will take only a minute. You can cross-examine him if you desire.

Mr. Dezendorf: Very well.

Mr. Biggs: Please step aside and let Mr. Husband take the stand. [215]

DONALD R. HUSBAND

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Biggs:

Q. You are an attorney-at-law, are you not?

A. I am.

Q. Admitted to practice at the Bar of this State, is that correct? A. (Witness nods head.)

Q. You are associated as one of the attorneys for the defendant in this action, are you, Mr. Husband? A. I am.

Q. Have you been representing the defendant in association with us during the pendency of the suit? A. I have.

Q. During the course of your preparation and investigation of the facts of this case, Mr. Husband, state whether or not you made an attempt to locate a cruise of the tract in dispute here which we

(Testimony of Donald R. Husband.)

have referred to as the Seaver tract prior to its sale in 1942.

A. I have. I think it was in December of 1957 when we first discovered from talking to Mr. Davidson that Mr. Hooker was the one that had performed the cruise. I think when I had talked to Mr. Davidson previously he couldn't remember who had [216] done that or whether a cruise had been made. Finally, when we were down in Mapleton, I think, about in December of 1957 he recollected that it was Mr. Hooker that had made this cruise.

Q. Had you first made any effort to locate such a cruise in the files of the company, Mr. Husband?

A. We have, and we asked Mr. Davidson if he knew of a cruise.

Q. Yes.

A. And he said he did not know where it could be found, but finally he suggested that we get ahold of Mr. Hooker.

Q. Did you do that?

A. I did. Mr. Hooker is an elderly man about 70 years of age or better, lives out—and I got him in the office and asked him about it and I think I have got a card or a letter here from him stating that he could not find it. He would go home and look. He thought he might have it. But let me—may I take a moment to look through my—

The Court: Well, I don't think you have to have the letter. Your testimony is sufficient.

Mr. Biggs: I don't think so.

(Testimony of Donald R. Husband.)

Q. You, in fact, reported that immediately?

A. I did, your Honor.

Mr. Biggs: Thank you, Mr. Husband. That's all.

The Witness: Well, anyway, he reported that there were [217] certain cruise books that he could not find and I can't remember—recollect the numbers, but he had the numbers and they ran consecutively from about, I think, 7 or 8 up to about 16. And he said, "I can't find them anywhere."

Mr. Biggs: You may cross-examine.

Cross-Examination

By Mr. Dezendorf:

Q. So that you have known about Hooker cruise since September of 1957, is that right?

A. I think that's when we first found out that that was the man that made the cruise, yes.

Q. Have you ever found that Lozo & Frost cruise that was made in 1944?

A. Mr. Dezendorf, I have never known of that.

The Court: You never knew of such a cruise?

Mr. Biggs: It was handed to Mr. Dezendorf yesterday and rejected and it has nothing to do with this property. And Mr. Hoffman was so notified when depositions were exchanged at Mapleton some months ago.

Mr. Dezendorf: Well, now, Mr. Biggs—

Mr. Biggs: The cruise was brought into the courtroom at Mr. Dezendorf's request and shown to him yesterday. And I asked him if he wanted

(Testimony of Donald R. Husband.)

to have it marked as an exhibit, and he [218] said, "No."

Mr. Dezendorf: The cruise I asked for, Mr. Biggs, was Lozo & Frost cruise relating to this property and you did not produce any such cruise.

Mr. Biggs: We have no such cruise.

The Court: Any further questions?

Mr. Dezendorf: No further questions.

Mr. Biggs: I will ask him one other question, then, if Mr. Dezendorf wants to pursue that further.

Redirect Examination

By Mr. Biggs:

Q. Have we produced to your knowledge—and I want you to answer this based upon a showing as to the investigation you have made—all of the cruises pertaining to this property that we have or that the company's files reveal or that anyone else has that anyone has told you they might have?

A. We have.

Q. All right. And have they revealed any other cruises than those we have produced?

A. Could I have that again?

Q. Has that search located any other cruises than those that have been here produced?

A. It has not.

Mr. Biggs: You may cross-examine.

Mr. Dezendorf: No questions. [219]

The Court: That's all.

(Witness excused.)

The Court: Mr. Davidson, please resume the stand.

Mr. Biggs: Your Honor, I think it might be helpful now if we could at this point in Mr. Davidson's testimony make use of our Exhibit 53.

The Court: Ask him the questions and let the Crier put that up. [220]

ARTHUR SHERMAN DAVIDSON

thereupon resumed the stand as a witness in behalf of the Defendant and, having been previously sworn, was examined and testified as follows:

Direct Examination

(Continued)

By Mr. Biggs:

Q. At the recess, Mr. Davidson, you were telling us about the development of a logging road into the Seaver tract or the area immediately contiguous to that, as I recall, and I think your testimony was that in 1942 at the time you bought the Seaver tract the roads had extended to within about four miles as the crow flies of the Seaver tract, is that correct? A. Roughly that, I think.

Q. Pardon? A. Around four miles.

Mr. Biggs: Yes.

The Court: What year was that?

The Witness: '42; at the time of this contract.

The Court: When was the Siuslaw Forest Products Company organized?

The Witness: '40 or '41. I think '40, probably.

The Court: When was the mill completed?

(Testimony of Arthur Sherman Davidson.)

The Witness: Oh, as near as I can remember, we started cutting in the fall of '42.

The Court: And, therefore, you had purchased the timber off the Seaver tract prior to the time that the mill got in [221] operation?

The Witness: Yes; I think a few months before.

Mr. Biggs: There may be a little dispute of testimony about that. I think some of the witnesses recollect that the mill actually was in operation, your Honor. But it was about that time.

Q. Now, Mr. Davidson, I am going to direct your attention to the map on the board which is identified as Exhibit 53.

The Court: Mr. Husband, would you mind moving a little?

Mr. Biggs: Can we move this down here a little bit?

The Court: All right. Go ahead.

Mr. Biggs: May I come around counsel table?

The Court: Yes. Surely.

Q. (By Mr. Biggs): Can you recognize from the map the Seaver tract on there, Mr. Davidson?

A. I imagine it's the red.

Q. It is the red? A. Yes.

Q. The legend shows that the green are the various tracts that you acquired from '39 to '47. The Seaver tract is shown in red (indicating). The pink line indicates road construction prior to or by 1942 and the black line shows the construction of the road by stages from '46 to 1950. Does that

(Testimony of Arthur Sherman Davidson.)

refresh your recollection of the situation in 1942, then, the extent of the— [222] —of the——

A. Yes, I think so.

Q. ——red line? A. Yes.

Q. Yes. Where were you actually doing your logging, then, in 1942, spring of '42, when you bought the Seaver tract?

A. Well, somewhere in the upper mile of that red line.

Q. It would be in the uncolored area up here some place? A. No. No.

Q. Down in here (indicating)?

A. I should have said the lower mile of the red line.

Q. The what?

The Court: Will you step down and designate it?

Mr. Biggs: Yes. Perhaps you can.

The Witness: We were logging somewhere in this area at that time (indicating). Our first logging operation started here (indicating). And by '42 we were down in here (indicating).

The Court: Will you show——

Q. (By Mr. Biggs): Probably somewhere in here (indicating) that you were in, Section 24? Some place in Section 24, is that right?

A. That's right.

Q. Is that correct?

A. And over—could possibly have been as far as 19——

Q. Yes. What kind of timber were you then taking for your [223] mill?

(Testimony of Arthur Sherman Davidson.)

A. Douglas fir, hemlock, cedar. No spruce in that area.

Q. All grades of Douglas fir; that is, old-growth, second-growth, and what not that you came to?

A. That's right.

Q. Yes. When you first talked with Mr. Warlick about the purchase of the Seaver property——

The Court: One minute. Don't answer that question.

Mr. Dezendorf: It may perhaps be a little preliminary, but I don't want to take any chances on it. I think the Court is aware of our position with respect to what the intention or conversation of the parties——

Mr. Biggs: My questioning now will be directed to negotiations and consummation of sales.

The Court: Make your record.

Mr. Dezendorf: I was finishing my sentence.

The Court: All right. Go ahead.

Mr. Dezendorf: Therefore, we make the same objection at this time that we did to the testimony of Mr. Warlick on the same subject. If your Honor wishes me to go into detail, I will.

The Court: All right. Just for one minute for the benefit of our friends.

Mr. Dezendorf: It is the position of the plaintiff as disclosed by the contentions in the pretrial order the word [224] "merchantable" as used in the contract of sale involved is not ambiguous; it is a word of known meaning and, therefore, the testimony of the individuals who entered into the

(Testimony of Arthur Sherman Davidson.)

contract with respect to what they may have intended when they used the word merchantable is not properly admissible. And, also, that any oral testimony to attempt to explain or vary the terms of the contract would be improper.

The Court: Objection is overruled. You may have an exception to this whole line of interrogation.

Q. (By Mr. Biggs): Now, if you will proceed, Mr. Davidson. Do you recall the question? When did you start your negotiations with Mr. Warlick or your first discussions with Mr. Warlick about the purchase of this property which we know in this case as the Seaver tract?

A. I couldn't tell you the number of months to the exact day. I imagine it was about the first time I met Marvin, because he wanted to sell that timber to me in 1940.

Q. Some time, you think, around 1940 is when you had your first discussion with him?

A. I am sure of that.

Q. So that the Court will know precisely what your situation was at that time, I would like you to tell us just what your plans and the plans of your crew were with respect to planning your operation in the Mapleton area at that time.

A. The corporation had just been formed. Our actual plan of [225] operation wasn't too far advanced except to the extent we had bought a sawmill up in the State of Washington and were in the process of moving it down there to erect at Mapleton and operate it as a sawmill and manu-

(Testimony of Arthur Sherman Davidson.)

facture lumber out of this timber which we had bought.

Now, just—see, we had already started a road-building up Hatchet Creek and, possibly, but the time that I first talked to Mr. Warlick I may have done a little logging by that time.

Q. Were you then particularly anxious to get the Seaver tract, Mr. Davidson? And when I say “you” I am speaking of you and your associates.

A. Well, as a corporation, frankly, the Board of Directors felt that we had purchased about all of the timber that we were in a position to purchase at that time.

Q. Yes. What was Mr. Warlick’s desire, to sell; or what were his express reasons for his desire to sell?

A. I am not sure that Marvin ever told me.

Q. Who was the aggressor in these negotiations?

A. Marvin Warlick.

Q. Was he representing himself as being somewhat urgent or anxious to sell?

A. Well, he was rather persistent in his efforts to interest me in the timber.

Q. Were there a series of conversations and conferences about [226] it? A. Oh, yes.

Q. A number of them, I mean?

A. Oh, yes.

Q. Where were they held?

A. At various places, I would say, wherever I would run into Marvin or he’d run into me.

(Testimony of Arthur Sherman Davidson.)

Q. Were some of them at your plant in Mapleton?

A. Yes; down at the office. Perhaps some at his cabin.

Q. What were the early discussions about prices of timber, Mr. Davidson?

A. Well, he was inclined to ask what I felt it was worth.

Q. Did you ever make a direct offer prior to the time that you settled on the price of \$7,000?

A. I wouldn't remember if I had definitely or not.

Q. Yes. Had he ever made demands for more than \$7,000? A. Oh, yes.

Q. What was he thinking about in the beginning?

A. Well, if I remember rightly, I think he talked \$10,000 to start with.

Q. Then was the price of \$7,000 that was ultimately agreed upon related by agreement to a unit price for the timber, so much a thousand for timber, or was it a straight negotiated lump-sum price of \$7,000?

A. Lump-sum price, unquestionably. [227]

Q. You stated that the cruise had been made, or did I ask you that question? Had you had a cruise made of the timber at that time?

A. At the time of the contract?

Q. At the time of the contract. A. Yes.

Q. Yes. Do you know about when that cruise was made, Mr. Davidson?

(Testimony of Arthur Sherman Davidson.)

A. No. But, not too long before the time of the contract.

Q. It was made with the purchase in mind, was it? A. Oh, yes.

Q. With a possible purchase in mind?

A. Oh, yes. Sure.

The Court: What is the name of that cruise; is that the Hooker cruise?

The Witness: That's right.

The Court: I thought the Hooker cruise was paid for by Mr. Warlick.

Q. (By Mr. Biggs): Do you remember who had the cruise made?

A. I couldn't swear who paid for it, but I can swear that I hired Mr. Hooker to do the cruising.

Q. All right. Do you have a copy of the cruise?

A. No.

Q. Do you remember what the cruise reflected in terms of thousands of board feet of various species on the property? [228]

Mr. Dezendorf: I will have to object to this. There is a positive dispute in the testimony as to what cruise we are talking about, I think, and I am not so sure that Mr. Davidson's memory may not be wrong as to his having the Hooker cruise.

My memory is that Warlick definitely testified that he retained Mr. Hooker to make the cruise for him. And I would object at this time.

The Court: Well, on what ground do you object?

Mr. Dezendorf: Two grounds: Secondary evidence——

(Testimony of Arthur Sherman Davidson.)

The Court: Well, I am ruling against you on the secondary evidence because I think the testimony is clear that they attempted to get the original document and the document is not available.

Mr. Dezendorf: And I think under this testimony—this gentleman's testimony is mistaken as to him having——

The Court: A lot of witnesses are mistaken, but that's no basis for excluding the testimony.

Q. (By Mr. Biggs): Do you have a present recollection about what it was? We are not expecting you to testify precisely, but in what range?

A. In the range of five million feet.

Q. Five million feet? A. Yes.

Q. Could be more or less than that?

A. Could be more or less. [229]

Q. Yes. Was there any discussion about the second growth at that time, Mr. Davidson?

A. If there was, I don't remember.

Q. Was there anything said about your taking the second growth; that Mr. Warlick wanted you to take second growth?

Mr. Dezendorf: That's leading and suggestive. The gentleman has said he doesn't remember. This is his witness. I would object.

The Court: All right.

Mr. Biggs: All right.

The Court: Go ahead and answer the question.

The Witness: If there was anything said, I just do not remember. That's the truth.

(Testimony of Arthur Sherman Davidson.)

Mr. Biggs: That's all right. That's exactly what we want, is the truth, whatever it is.

The Witness: Yes.

Q. (By Mr. Biggs): Now, what was said about the amounts of timber that you were buying on the place with respect to it being all or some or certain grades or species?

Mr. Dezendorf: I would object again to that as leading and suggestive. It's a vital point in the case and it's his witness.

Mr. Biggs: That isn't a leading question. I asked him what was said with respect to those things.

The Court: Well, there isn't too much specificity in the [230] question, but I am going to overrule the objection because the witness has indicated he is going to answer what he regards to be the facts anyway.

Mr. Biggs: Yes.

The Witness: I hope I understand the question. Are you asking me if I was to get all of the timber or——

Mr. Biggs: Well, I asked you—yes. That was the purport of the question. Were you or were you not?

A. I was.

Q. Were there any species of timber reserved at all, or kinds of timber reserved from that contract by your understanding with Mr. Warlick?

A. Well, cedar.

Q. Was there any cedar on there?

A. A few trees. There is some cedar stumps there.

(Testimony of Arthur Sherman Davidson.)

Q. Did you know that then? A. Oh, yes.

Q. You knew there was cedar on there?

A. Sure.

Q. How did you know that?

A. You could see them.

Q. Oh. You had seen them? A. Yes.

Q. Then what was said about the time for the removal of the timber? [231]

A. Well, we knew that it would be a long time before we would be built up to there and I requested plenty of time to take it off. And Mr. Warlick was quite agreeable to giving me plenty of time because, I believe, he stated before he was anxious to have the property left in its original shape, condition.

So it was agreed that we should have twenty-five years to take it off.

Q. Were there any immediate plans? Did you then have immediate plans for the operation of that tract?

A. Oh, no, not—might I explain? To us the minute that we bought that tract it wasn't a separate tract; it was a portion of the tract we already had and it would be logged at the natural operation—as the natural operation led to it.

Q. Is that the way it was logged, or were you connected with the company when the logging actually started there, Mr. Davidson?

A. No. I had already been separated from the——

Q. When did you separate from the company?

(Testimony of Arthur Sherman Davidson.)

A. '45.

Q. 1945? A. '45.

Q. Was that about the time U. S. Plywood acquired an interest in the company?

A. That was the time, yes; within a few [232] months.

Q. Now, among your associates you mentioned a Mr. Lewis from Washington. What was Mr. Lewis' principal business?

A. McKee & Lewis. They operated——

Q. Yes.

A. ——as a partnership up there, or—they were the main exporters of timber products to Japan and China.

Q. Poles and pilings?

A. Poles and pilings, and even some logs.

Q. Was there any interest or general plan on the part of this group that formed Siuslaw Logging Company to develop that entity in Oregon for overseas market?

A. It was very definitely our idea to do so.

Q. Yes. Where were the markets other than Japan and overseas markets? Were there markets here in the Pacific Coast area?

A. Oh, yes; San Francisco, Los Angeles.

Q. I believe you testified this morning—we may have overlapped a little bit——

The Court: For what?

The Witness: Pilings.

The Court: You have mentioned poles for the

(Testimony of Arthur Sherman Davidson.)

first time. Do they use fir poles, or do they use mainly cedar poles?

The Witness: Oh, at the present time they use fir poles mainly. In years past they used to use lots of cedar poles, but, oh, from the time we are talking about on or even before [233] they used fir poles.

The Court: What kind of trees did they use for poles?

A. Well, the smaller fir on up. You know, poles are poles and there is a very great difference in the size of them. They use—about the smallest, oh, that the ordinary market takes is a 25-foot pole with 6-inch top.

The Court: So did you use second-growth or old-growth?

The Witness: We used second-growth because they treat the poles. You understand, they creosote them. Now, a second-growth tree is the only fir tree that they use for treating. They do not use an old-growth fir for treating because of the sap content of an old-growth; it doesn't absorb creosote.

The Court: Oh. Go ahead.

Mr. Biggs: I think you may cross-examine. Just one other question.

Q. Mr. Gonyea was mentioned as one of your associates. That's Mr. Henry Gonyea of Washington?

A. That's right. Mr. Henry Gonyea.

Q. Yes. Was he or his son directly or actively connected with the operation, the Siuslaw Forest Products Company, in this area?

(Testimony of Arthur Sherman Davidson.)

A. Yes. Both he and his son. His son was my assistant at Mapleton all of the time that I was with Siuslaw Forest Products.

Q. Will Gonyea? [234] A. Will Gonyea.

Q. What were his duties, generally, Mr. Davidson?

A. Well, he handled our sales, our office, and did most of the work.

Q. Was he around the office? Was he around the office a good deal of the time? A. Yes.

Q. Actually, shortly after '42 or '3 you retired briefly from the business, didn't you, on account of an accident or something for a year or several months? A. Well, yes.

Q. And—— A. For a period of time.

Q. And he took over, then, the active operation for awhile? A. Yes.

Q. Was he present, to your recollection, during any of your negotiations or conferences with Mr. Warlick, Mr. Davidson? A. Oh, I think so.

Mr. Biggs: Yes. You may cross-examine.

The Court: Just one second. Will Mr. Sanders and some of the other witnesses take places in the jury box and then other people can sit down there. All right, Mr. Dezendorf. [235]

Cross-Examination

By Mr. Dezendorf:

Q. You looked over the Seaver property yourself, did you not?

A. Yes; to a certain extent I did.

(Testimony of Arthur Sherman Davidson.)

Q. You didn't buy it with the idea of buying any poles or pilings? A. Yes, I did.

Q. Isn't it a fact, Mr. Davidson, that that is bought by lineal foot? A. No.

Q. At times?

A. It may be at times, but it is not at all times by any means.

Q. Did you hear Mr. Warlick testify this morning that you said you didn't want any of the second-growth? A. Yes, I heard him.

Q. And that was correct, wasn't it?

The Court: What did you say?

Q. (By Mr. Dezendorf): And that was correct, wasn't it?

A. Correct, as he testified to that, but not that I didn't want it.

Q. Did you tell him that you didn't want it?

A. If I did, I do not remember it. And that's the truth.

Q. You don't believe Mr. Warlick is lying about that, do you? [236]

The Court: Oh. I don't go for that stuff.

Q. (By Mr. Dezendorf): Do you recall whether you had the May 4th, 1942, contract drawn by a lawyer or not? A. I am sure that I did not.

Q. Who did; do you know?

A. No, I do not. But I would suppose it would be Mr. Henry Gonyea, who was General Manager of Siuslaw Forest Products. I was Resident Manager, and Henry Gonyea was General Manager who looked after those things.

(Testimony of Arthur Sherman Davidson.)

Q. You don't recall yourself talking to any lawyer about what your agreement was with Mr. Warlick, is that correct? A. No, I do not.

Q. How did you transmit the information to Mr. Gonyea as to what your agreement with Mr. Warlick was?

A. He was Chairman of the Board of Directors, and I was on the Board. And at a Directors' meeting, naturally all of those things were discussed.

Q. You don't think you made a written memorandum that would be available to Mr. Gonyea covering your negotiations with Mr. Warlick on this piece of timber? A. I doubt if I did.

Q. I take it that you don't know what lawyer, if any, drew that agreement?

A. No; I wouldn't know.

Q. Did you read the agreement over after it was drawn? [237] A. Oh, yes.

Q. Was it the agreement that you made with Mr. Warlick? A. Yes; sure it was.

Q. And you signed it? A. Certainly.

Q. You knew what merchantable timber was, didn't you? A. I think I do.

Q. Yet you say—or said on direct examination that you were to have all of the timber; is that correct?

A. That's right. I believe that's true. I still believe it.

Q. But there is no doubt in your mind that you read and understood the May 4th, 1942, contract before you signed it? A. That's right.

(Testimony of Arthur Sherman Davidson.)

(At this point Mr. Biggs' last question was read by the Court Reporter.)

Mr. Biggs: The question was "understood the contract." Was that in there, "read and understood"?

The Court: Read and understood the contract.

Mr. Biggs: Yes.

Q. (By Mr. Dezendorf): Mr. Davidson, isn't it possible that you are confused about having the right to take all the timber with a later transaction you had with Mr. Warlick concerning other timber?

A. Oh, I think not. [238]

Q. Did you have a later transaction with Mr. Warlick covering other timber? A. Yes.

Q. Did that talk about merchantable timber?

A. I couldn't tell you until I read it again.

Q. While you're pretty positive that you were to get all the timber in this first transaction, is it your statement you don't remember whether you were in the second one?

A. No. I am just as positive that I was to get all of the timber—may I talk just freely?

The Court: Go ahead.

The Witness: I was to get all of the timber that was of any use to me. Now, that's my understanding.

The Court: In what transaction?

The Witness: In both of them.

The Court: In the Warlick transaction and in the later one?

(Testimony of Arthur Sherman Davidson.)

The Witness: Yes. That's right.

Q. (By Mr. Dezendorf): Where was the piece that you bought from Mr. Warlick in the second transaction with him?

The Court: Do you want to step down to the map and locate it?

The Witness: It's a portion of the lower green there (indicating).

The Court: Do you know what it is—— [239]

The Witness: 19, 9.

Mr. Biggs: Would you want to point it out to him, Mr. Davidson? You can just step down and indicate it on the map.

The Witness: It's this one right down in through here and down in here (indicating). Now, that is all of this green area from this line on (indicating).

Mr. Biggs: Indicate the township, if you will, or the range.

The Witness: 19, 9 and 3, 4, 5 and 6—3, 4 and 5. It doesn't get into 6.

Mr. Biggs: For the record, your Honor, the witness is indicating the green areas south and east of it.

The Court: All right. You can resume the stand. Are you satisfied that is the property?

Mr. Dezendorf: I don't know this property.

The Court: Oh.

Q. (By Mr. Dezendorf): Mr. Davidson, did you have a contract drawn with Mr. Warlick covering

(Testimony of Arthur Sherman Davidson.)

the second transaction with him? A. Yes.

Q. You did it yourself that time, is that right?

A. No.

Q. You did not? A. No. [240]

Q. Do you know what lawyer drew the second contract?

A. Yes; I think I do. If I am not mistaken, it was Mr. Calkins.

Q. How does it happen that you know who drew that one and not the first one?

A. I bought that second tract myself, for my own personal self.

Q. I see. Do you remember whether the second contract gave you the right to cut anything that might become merchantable during the life of the contract?

A. I am inclined to think it did.

Q. What about the first one?

A. May I again talk?

The Court: Go ahead.

The Witness: Marvin and I unquestionably intended the same thing in the first contract that we did in the second. Possibly weren't careful enough in our wording.

Q. - (By Mr. Dezendorf): Mr. Davidson, you have been in this business for many, many years, haven't you? A. That's right.

Q. And you know what a contract means when it says merchantable timber and you know what a contract means when it says you buy all the timber, don't you?

Mr. Biggs: Your Honor, I object to that be-

(Testimony of Arthur Sherman Davidson.)
cause that's what this lawsuit is about. And I think you will find lawyers [241] and judges puzzled somewhat over just what that means.

The Court: Well, he hasn't been asked yet.

Mr. Biggs: It means what the parties intended it to mean.

The Court: You asked him if he knows what merchantable timber is and he said he thought he knew, but you haven't asked him what his definition is.

Mr. Biggs: That's right.

The Court: So I am going to ask him. What is your definition of merchantable timber?

Mr. Dezendorf: Well, if the Court please, does my objection go to this?

The Court: You can have an objection. I just want to know what his views are——

Mr. Dezendorf: Very well.

Mr. Biggs: I will adopt the question if the Court doesn't want to.

The Court: ——as applied to this—or in general, first, and then as applied to this particular transaction.

The Witness: You are speaking of standing timber?

The Court: Yes.

The Witness: My definition of a merchantable tree or merchantable timber would be timber from which one can obtain marketable products, wood products.

The Court: And was that your definition in response to [242] Mr. Dezendorf's statement?

(Testimony of Arthur Sherman Davidson.)

The Witness: Sure.

The Court: And would you say that your definition as applied to this particular tract was any different than your general idea?

The Witness: No. No.

The Court: All right. Go ahead.

Mr. Dezendorf: May I have Exhibit 30-A? I guess I mean -B. It's in the white envelope I opened by mistake this morning. Could I have that marked 30-B, please?

The Court: I don't think you can use it now, Mr. Dezendorf. We gave you the opportunity this morning and you rejected my offer. I said to you at that time "Do you want that exhibit marked and made available?" And you said, "No." And you stood on your rights to have it as a sealed exhibit. Now I am going to rule you can't use it.

Mr. Dezendorf: Well, may I make a statement with respect to that?

The Court: That's perfectly all right. But I gave you that opportunity. You know that there are no tricks in this court and you have got to show the exhibit to someone else. That exhibit should have been shown to them this morning.

Mr. Dezendorf: For the record may I say that your Honor's limitation on me was with respect to the questioning that I was then directing to Mr. Warlick, and your Honor gave me the [243] privilege of pursuing the testimony with Mr. Warlick on the line that I was going if I wished to show Mr.

(Testimony of Arthur Sherman Davidson.)

Warlick the exhibit—or at least that is the way I understood your Honor's ruling.

The Court: Mr. Dezendorf, you have been a member of this Court for a long, long time. I explained to you in detail in chambers when we took your statement outside the presence of Mr. Warlick that there are only two methods that you can use to use an exhibit: One, a sealed exhibit solely for purposes of impeachment and not as substantive evidence; the other one is that the exhibit must be marked and made available and exhibited to Counsel. At that time you elected—I asked you specifically, "Do you want this exhibit marked?" And you said, "No." So under the rules of this Court you may not use it.

Mr. Dezendorf: May I have it marked?

The Court: Yes. It is marked now.

The Clerk: It is marked now.

(At this point a three-page photostatic copy of a document entitled Contract and Agreement dated August 10, 1945, was marked for Identification as Plaintiff's Exhibit 30-B.)

Mr. Dezendorf: May I exhibit it to the witness?

The Court: Well, Mr. Dezendorf, I have just ruled that [244] you can't use it.

Mr. Dezendorf: Very well, your Honor.

The Court: It's a direct violation of my ruling this morning, except if you want to use it for impeachment, and up to now you haven't shown any grounds for impeachment of this witness.

(Testimony of Arthur Sherman Davidson.)

Mr. Dezendorf: May I ask that Mr. Warlick be asked to stay?

The Court: Yes. I have ordered him to stay this morning.

Mr. Dezendorf: Thank you, your Honor.

Q. Now, my understanding, Mr. Davidson, was that you said you didn't expect to reach the Seaver property with the road for quite some time: is that correct?

A. That's right. We wouldn't, naturally, be up there for a period of time.

Q. How much of the road which is shown on that map partially in red and partially in black, if any, was County road?

A. I believe the first half-mile.

Q. Of the red part?

Mr. Biggs: One-half mile?

Mr. Dezendorf: That's what he said.

The Witness: The first half-mile.

Q. (By Mr. Dezendorf): The Seaver place in 1942 was quite inaccessible, was it not?

A. Well, less so than it is today, of course. [245]

Q. There was no usable road into it in 1942, was there? A. Oh, yes.

Q. What kind of a road was there?

A. Well, not a good road, but a road that you could drive a car in there.

Q. But you had to go 20 miles on that road to Mapleton to get there, didn't you?

A. Possibly the—yeah: right close to 20 miles. That's right.

(Testimony of Arthur Sherman Davidson.)

Q. And that's very much longer than the present road, is it not?

A. Yes; about—I think that's 12 miles in there.

Q. Now, the last four miles of road into the Seaver property was over very steep terrain, was it not?

A. Pretty rough country.

Q. It was much rougher than a portion of the road that is shown in red, was it not?

A. Yes. The first portion, the red portion there, has always followed Hadsall Creek.

Q. Now, is it your memory, Mr. Davidson, that cedar timber was expressly excluded from the May 4th, 1942, contract?

A. Will you ask me again, please?

(At this point Mr. Dezendorf's last question to the witness was read by the Court Reporter.) [246]

The Witness: I doubt if it was expressly excluded. It just wasn't included in the contract.

Q. (By Mr. Dezendorf): And you knew that it wasn't included?

A. Oh, yes.

Q. Was there any occasion that you can think of now why the Seaver property and the adjoining property to the north was cruised by Lozo & Frost in 1944 and 1945? Was there any reason why that might have been done?

A. If it was cruised by Lozo & Frost, I did not know it. I had nothing to do with it.

Q. Well, perhaps you missed the point of my question.

A. Yes.

(Testimony of Arthur Sherman Davidson.)

Q. Was there any sale of Siuslaw Forest Products itself in prospect in 1944 or '45 which would have indicated the necessity for cruises?

A. That might be all right because we were negotiating with U. S. Plywood to take the interest from us.

Q. Was that as early as 1944 and 1945?

A. Yes. The sale was consummated in '45; that is, United States Plywood took an interest in Siuslaw Forest Products in '45.

Q. And, as a matter of—excuse me if you are not through.

A. Well, I was going to say in all probability they were already negotiating in '44.

Q. Isn't it a fact that in the course of those negotiations [247] that all of the timberland and timber rights that you had were cruised at that time?

A. No; I don't think they were.

Q. What ones were not cruised?

A. Oh, I think very little of them was cruised. I think very little of it was cruised. If I may speak again——

The Court: You go ahead.

The Witness: Ofttimes I buy a piece of timber and I never cruise it, but I will say to a cruiser, "Van, go in there and see if there is that much timber there." I know to buy that piece of timber I have to be justified to buy it. There has to be so much timber.

Now, a cruiser can go on a piece of timber oft-times and come near enough to knowing what is

(Testimony of Arthur Sherman Davidson.)

there without making an actual cruise of it. He can come back and tell me, "I am sure there is enough timber there to justify buying it."

Now, there was investigations made all right on the timber to look at it, but I am sure as far as a definite cruise it's my honest opinion that there was not. There may have been portions of it, but as a whole it was not.

Mr. Dezendorf: I think that's all at this time.

The Court: All right. You may step down.

Mr. Biggs: Mr. Gonyea.

(Witness excused.) [248]

WILFORD H. GONYEA

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Biggs:

Q. Where do you live, Mr. Gonyea?

A. Here in Eugene.

Q. How long have you lived here?

A. I have lived here since about 1945.

Q. What is your occupation?

A. I am President of the Umpqua Plywood Corporation and General Manager of the Clear Fir Sales Company.

Q. Umpqua Plywood Corporation is a corporation engaged exclusively in the manufacture of plywood, is it?

(Testimony of Arthur Sherman Davidson.)

A. No, sir. We also manufacture lumber and certain other by-products and hardboard.

Q. And from your own timber tracts, or do you buy logs?

A. From our own timber and open-market logs, both.

Q. What is the Clear Fir Company?

A. The Clear Fir Company is a marketing organization for marketing not only the products of the plants that we own ourselves, but also marketing for other organizations on a contract relationship.

Q. Are you related to Henry Gonyea—

A. I am his son. [249]

Q. —who has previously been identified in the record? A. I am his son.

Q. You are his son? A. I am his son.

Q. When did you first come to Eugene, Mr. Gonyea, and in what connection?

A. Well, I first came to Oregon—to Mapleton or Eugene?

Q. Mapleton, that's what I meant.

A. In 1940. For the first year I was there about 50 per cent of the time and thereafter full-time more or less representing my father and his partner who was interested in Siuslaw Forest Products.

Q. Did you work directly with Mr. Davidson?

A. Yes; I was his assistant.

Q. What was Mr. Davidson's connection with the company?

A. Mr. Davidson was Resident Manager at Mapleton.

(Testimony of Wilford H. Gonyea.)

Q. And you were given the title of Assistant Resident Manager, were you?

A. Well, we—I was Assistant Manager. I don't know about the title. But that's what——

Q. The first year you say you were there about half of the time and the next year, and from that time on you were there full-time as long as you retained a connection with the company, is that correct? A. Right. [250]

Q. Had a mill been constructed in 1942, Mr. Gonyea?

A. No. The reason I was there this half-time is because we were just opening the property up. There wasn't enough to require full-time. We started building the mill, as I remember it, in '41 and completed it in '42.

Q. Do you remember about when in '42 it was completed?

A. My best recollection is in the fall.

Q. The fall of '42? A. Yes.

Q. So that this timber purchased, the Seaver tract, occurring in May of '42 was a few months prior to the actual completion of the mill——

A. Yes.

Q. ——according to your recollection, is that correct? A. Yes.

Q. What was Siuslaw doing with its logs, the logs that you were then taking out of the forest in 1940, '41?

A. We were selling them on the open market.

(Testimony of Wilford H. Gonyea.)

Q. What kind of logs were you selling, Mr. Gonyea?

A. Well, everything that came off the tract; old-growth fir, second-growth fir, spruce, hemlock, some cedar.

Q. Was there a market for second-growth logs at that time, speaking now of '41, '42? A. Yes.

Q. Who were your principal markets or purchasers at that [251] time, Mr. Gonyea?

A. We weren't bringing out very much second-growth at that time because we were logging a primary old-growth area.

Q. Yes.

A. What second-growth did come out went to the mills right there on the river.

Q. Were you cold-decking some of it in anticipation of the operation of your own plant?

A. No. We didn't cold-deck logs. We had plenty of water storage there.

Q. You had plenty of water storage?

A. That's right.

Q. What utilization—well, I will ask you this: In your experience here in Lane County and prior to 1942 did you make any investigation of the market situation with respect to second-growth timber products?

A. I made no investigation; just the knowledge that you acquire from the ordinary business practice of selling lumber and lumber products.

Q. Did you have some acquaintanceship with the market? A. Yes.

(Testimony of Wilford H. Gonyea.)

The Court: Before 1942?

The Witness: Yes, sir.

The Court: How long have you been in the lumber business?

The Witness: Since 1927. [252]

The Court: Oh.

Q. (By Mr. Biggs): You were in the lumber business in Washington prior to coming to Portland? A. Yes—correction on that.

Q. Prior—

A. I was in the door manufacturing business closely allied with the lumber business. Our primary business was the manufacture of doors and in connection with that we had mill connections with lumber and handling of lumber products, too.

Q. Then you acquired some familiarity with the lumber market in Lane County and Western Oregon prior to 1942? A. That's right.

Q. What utilization was made—commercial utilization was being made of the second-growth timber in 1942 and the time prior thereto that you are familiar with?

A. Well, second-growth timber was made into poles, pilings; in the lumber products, primarily in dimension, car-decking, studs, general construction material.

Q. Now, if you will take just a minute or two you can educate all of us just a little bit, or at least you can educate me on what is dimension lumber.

A. Dimension is the ordinary lumber that goes

(Testimony of Wilford H. Gonyea.)

into the building of homes: 2 by 4's, 2 by 6's, 2 by 10's, 2 by 12, anywheres from 8-foot to 24-foot in length.

Q. Was second-growth being manufactured for that purpose at [253] that time? A. Yes.

Q. What are studs?

A. Studs are 2 by 4, 8-foot.

Q. What, then, are some of the other terms you used? Car-decking?

A. Car-decking is used in the manufacture of railroad cars. In the old days they were making a good many more wooden floors then they are today, although they still use wooden floors to a great extent in boxcars.

Q. Who were the purchasers?

A. Railroads.

Q. Was that a considerable market in itself?

A. Yes, it was.

Q. Any other special uses other than saw logs?

A. No; not that I have in mind.

Q. Was it used at all at that time for interior furnishings?

A. A second-growth log is not a clear log; it's a dimension log. It lends itself more readily to that construction type of material.

Q. Yes. Now, are you familiar with the discussion of the associates who formed the Siuslaw Forest Products, of their program in this area, what they were planning when they came into Oregon?

A. They had a long-range program in view, to

(Testimony of Wilford H. Gonyea.)

establish a [254] utilization, an organization there, for converting the timber that they were acquiring.

Q. Would you just expand on that a little bit? You say a long-range program. What did you mean by that?

A. Well, we were buying timber whenever we could find it in as large quantities as we could procure, with the knowledge that it would be a long-time operation, be considerable time before we would use it up and, as a result, contemplated the first demand for the building of a sawmill. And as we continued on we would have undoubtedly been a plywood plant, too. But we had a program in mind of establishing an integrated lumber industry there for a long-range operation.

Q. By a long-range you mean a permanent operation in the sense of even acquiring timber on a perpetual cutting program, for a perpetual cutting program?

A. That question is a very intricate one. There is the question of Forest Service reserve or things of that sort. We were not on a sustained-yield program operation within our own company, no.

Q. Well, now, did you participate in any of the negotiations for the purchase of the Seaver tract, Mr. Gonyea?

A. I sat in on several of the discussions regarding the purchase of the Seaver tract.

Q. The actual responsibility to consummate the deal was left to Mr. Davidson and the senior associates, isn't that correct? [255]

(Testimony of Wilford H. Gonyea.)

A. Mr. Davidson and Mr. Lewis were both considered experts in that particular field, and that was the—well, actually, we all went down there because Mr. Davidson's knowledge on timber——

Q. You all what?

A. Went to Mapleton or invested in Mapleton because of Mr. Davidson's primary knowledge of timber.

Q. I see. Well, did he discuss with you, then, what the interest of the group—or whether the group would be interested in acquiring the Seaver tract?

The Court: Do you want to take an exception?

Mr. Dezendorf: I thought the question was going to be broader than it was. That one I have no objection to.

The Court: All right. Go ahead.

The Witness: The Seaver tract——

Mr. Dezendorf: Well——

Mr. Biggs: Answer the question Yes or No. Mr. Gonyea.

The Witness: Will you repeat it, please?

Q. (By Mr. Biggs): Did Mr. Davidson discuss with you the purpose of buying the Seaver tract or the likelihood of your associates being interested in buying the Seaver tract, the purposes for purchasing it and that sort of thing? Did you talk it over with Mr. Davidson, is a simpler way to state it?

A. Yes.

Q. In the conversations between Mr. Davidson

(Testimony of Wilford H. Gonyea.)

and Mr. Warlick [256] that you may have heard or participated in——

The Court: What is that again?

Q. (By Mr. Biggs): In the conferences between Mr. Warlick and Mr. Davidson for the purchase of this tract which you may have heard or participated in——

The Court: He didn't say he participated in any of these.

Mr. Biggs: He said he sat in on them and heard them, your Honor, if I am not mistaken.

The Court: I thought he sat in on discussions. I thought that referred to the Board of Directors or to the business.

The Witness: Both of them, your Honor.

The Court: Did you hear some of the conversations with Mr. Warlick?

The Witness: Yes.

The Court: All right. Go ahead.

Q. (By Mr. Biggs): Would you state what the discussions were with respect to the extent of the timber that Mr. Warlick was offering to sell to Mr. Davidson?

A. May I add to that in general conversation, your Honor?

The Court: Yes. Just limit it to the conversation that took place between Mr. Warlick and Mr. Davidson in your presence.

Mr. Biggs: That is correct.

The Witness: We were very informal in our discussions down there, very informal in any line of

(Testimony of Wilford H. Gonyea.)

authority within the [257] business, and for that reason I was able to speak up in some of the meetings.

Your question is specifically regarding quantities?

Q. (By Mr. Biggs): I wanted to ask a series of questions, but did you hear them discuss how much of the timber on that tract was to be conveyed? A. No.

Q. You did not?

A. How much of the timber? All of the timber, but not in footage, not in terms of footage.

Q. I am not talking about that. A. Yes.

Q. Quantitatively did you hear the discussions as to whether it was to be all or part of it or only certain species, or what?

The Court: I think he ought to be a little more specific. Will you tell us now what the conversation was? And if you participated in the conversation you tell us what you said.

Mr. Biggs: Yes.

The Witness: All right. For a period of several months Mr. Warlick was very anxious to sell his timber and he called on us in connection with other business matters as well as this, and in each instance there would be some discussion about the prospect of closing a deal on this timber. Our organization was not particularly anxious to buy the timber at first because [258] it was a long-range deal. But finally Mr. Warlick was anxious to get the money out of the deal and, as Mr. Davidson indicated, he is a pretty good bargainer, and they

(Testimony of Wilford H. Gonyea.)

bargained back and forth discussing the thing, at all times we feeling—now, I can't remember specific words—but never——

The Court: All right. Now, this is all preliminary.

Mr. Dezendorf: And I move that it be stricken.

The Court: Well, I think it's just background. But now we are getting down to the main issues. What was said by Mr. Warlick or by Mr. Davidson with reference to the timber? Was any portion of the timber to be retained? Was it all to go? Were certain species to go? Were certain species to be reserved? That's just generally. You tell us specifically what the conversation was as best you can remember. If you can't remember the exact words, give us the best recollection you have.

The Witness: All right. There was nothing to be reserved by Mr. Warlick except a few cedar trees, as I understand it or remember it. The cedar in the tract from—in that country is very poor cedar, anyhow, and it was of no import to us. If we were to get anything that was up there on that tract of land that we could make usable or make some money out of it, the conversation——

The Court: What was said?

The Witness: Well, goodness, sir, we met fifteen or [259] twenty times. Discussions go on and you bargain back and forth on money.

Mr. Biggs: If you don't remember, Mr. Gonyea, say so.

The Witness: The exact words——

(Testimony of Wilford H. Gonyea.)

Mr. Biggs: The Judge didn't ask you for exact words. If you remember the substance, tell what the parties were talking about.

The Witness: The substance of it was that we were to get the timber that was on the property.

The Court: Was there any argument between Mr. Warlick and Mr. Davidson with reference to the quantity? In other words, you said that Mr. Davidson was a good bargainer as far as price was concerned. Did he ask for more timber and was there any argument about the amount of timber?

The Witness: I can't remember specifically. There undoubtedly was.

The Court: Was there any conversation with reference to old-growth as compared to second-growth?

The Witness: No, sir.

The Court: All right. Go ahead.

Mr. Biggs: All right.

Q. Were you present at the Board of Directors meetings when the offer was reported, if it was reported, by Mr. Davidson to the Board of Directors for authority to consummate the transaction? [260]

Mr. Dezendorf: I think I would have to object to that. I think that's going a little far to bind us with what they may have said in the Board of Directors meetings.

Mr. Biggs: I am reflecting an intention, if the Court please, of the parties to show what Mr. Davidson intended and Mr. Warlick intended. I think if this witness recalls it we can show what the discussions were in the Board of Directors.

(Testimony of Wilford H. Gonyea.)

The Court: I am in doubt as to the ruling on this one. Because if there was some pleadings in the case to substantiate an allegation of reformation based upon mutual or unilateral mistake, this testimony might be admissible. But on the state of the record and in view of the Rules of this Court I don't see how a statement made by Mr. Davidson or Mr. Gonyea to the Board of Directors would tend to prove or disprove any issue in this case.

Mr. Biggs: I don't make claim very much for it except this: That is might be proof of an intent of one of the parties.

The Court: All right.

Mr. Biggs: But we will pass that over.

The Court: Objection is sustained.

Q. (By Mr. Biggs): Now, to your knowledge were there mills in the area in 1942 and prior to that time exclusively engaged in the manufacture of second-growth timber, Mr. Gonyea?

A. Exclusively? I couldn't tell you if they were exclusively [261] engaged in it. But substantially engaged in it.

Q. Were there mills substantially engaged in the manufacture of second-growth timber prior to May 4th, 1942? A. That's correct.

Q. To your knowledge? A. That's right.

Q. Were those the products you enumerated earlier?

A. Yes; some of those products were made by them; yes.

Q. Here in Lane County? A. Yes.

(Testimony of Wilford H. Gonyea.)

Q. What about the hemlock? How was it utilized or what market was there for hemlock in 1942?

A. The lumber market on hemlock was limited, but there was an excellent market as far as pulp logs.

Q. For what?

A. For the pulp logs for the manufacture of paper.

Q. Do you know who was buying hemlock logs?

A. Crown-Zellerbach and Oregon Pulp & Paper were both buying them.

Q. Is that in the late 30's and early 40's as well as later on in the 40's? A. That's right.

Q. Yes. Would you consider, then, that hemlock was a commercially useful product, timber product, in 1942? A. Yes. [262]

Q. Did your company sell any hemlock to Crown-Zellerbach? A. Yes, we did.

Q. And commencing when, Mr. Gonyea, if you recall, in your first logging operations did you—

A. Very shortly thereafter. My best recollection is that we sold hemlock down—loaded it down at Siboco—

Q. To whom?

A. We loaded it at Siboco Slough.

Q. Oh.

A. And sold it to Crown-Zellerbach, if I am right.

Q. And continuously thereafter have you supplied Crown-Zellerbach?

A. Well, until we left the company.

(Testimony of Wilford H. Gonyea.)

Q. Until you left the company? A. Yes.

Q. When did you leave the company?

A. In 1945 when the deal was made with U. S. Plywood.

Q. At that time U. S. Plywood acquired majority control of the corporation? A. That's right.

Q. That's when you ceased having a direct connection with this operation?

A. I ceased very shortly after that.

Mr. Biggs: Very shortly after. That's all. You may cross-examine. [263]

The Court: We will take a ten-minute recess.

(Recess taken.)

The Court: All right, Mr. Dezendorf.

Cross-Examination

By Mr. Dezendorf:

Q. As I recall your testimony, Mr. Gonyea, you were not bringing out very much second-growth timber before 1942.

A. I think that's correct.

Q. Actually, all you were bringing out was what you had to fell——

Mr. Biggs: Was there an answer to that question, or was it a question?

Mr. Dezendorf: Yes.

Mr. Biggs: What was your answer?

The Witness: Yes.

Q. (By Mr. Dezendorf): Actually, all you were

(Testimony of Wilford H. Gonyea.)

taking out was what you would fell in taking out your old-growth?

A. No; that isn't quite right.

Q. What is the fact?

A. When you say what we had to fall in order to take down our old-growth——

Q. Yes.

A. ——we took it as a matter of timber harvesting in the area. The type of timber that we were in was substantially [264] old-growth, smaller amounts of second-growth, and second-growth in certain areas of the logging show. It wasn't necessarily intermingled with the old-growth. And it could be standing by itself along creek bottom, or something of that sort.

Q. But you were primarily interested in old-growth?

A. We were primarily taking out old-growth.

Q. Yes. Now, would you mind naming the mills for me that you say were buying second-growth in that area in 1941 and 1942?

A. Orval Phelps.

Q. Anybody else?

A. Ray Swensen was cutting some second-growth.

Q. No. I am talking about mills that you said you sold to.

A. Swensen Lumber Company. Oh. That we sold to.

Q. That was my question.

A. Oliver LaDuke.

(Testimony of Wilford H. Gonyea.)

Mr. Biggs: Who was that?

The Witness: LaDuke.

Mr. Biggs: Is that L-a or L-e?

The Witness: L-a capital D-u-k-e.

Q. (By Mr. Dezendorf): What price were you getting for your second-growth logs that you sold and delivered to Mr. LaDuke?

A. I can't tell you right now.

Q. It was \$6.00 delivered at the mill at Florence, wasn't it? [265]

A. I can't tell.

Q. Does that sound about right?

A. It doesn't sound reasonable, no.

Q. Now, what other mill—to whom were you selling second-growth in '41 and '42?

A. We sold second-growth to a mill on the North Fork, Mr. Dezendorf. I am hazy as to whether that was in '41 or '42 or maybe a little after '42. But in that general time we were selling second-growth to this mill on the North Fork.

Q. You don't know——

A. Harry Beech. The Beech——

Q. But that might have been later?

A. It could have been.

Q. What about LaDuke. Could that have been later, too?

A. No.

Q. All right. What other mills?

A. Well, those were the——

Q. In '41 or '42?

A. Those were the mills that were on the Siuslaw River at tide-water at that time.

Q. So those would be the only ones?

A. That's right.

(Testimony of Wilford H. Gonyea.)

Q. Now, is it your statement that you were selling hemlock to Oregon Pulp & Paper Company in 1942?

A. We were selling hemlock to either Crown-Zellerbach or [266] Oregon Pulp & Paper Company in 1942.

Q. Where were they taking the hemlock to process it?

A. They would take it to pulp—they call it the pulp station—there on the Columbia River—the Willamette River just out of Oregon City.

Q. How would it go, by rail? A. By rail.

Q. Where would it be loaded to rail?

A. Down at Siboco. Siboco Slough. That is across the river from Cushman.

Q. And you were pretty sure you were selling hemlock logs to them in 1941 and 1942?

A. In 1942 I am quite sure we were.

Q. Before May?

A. Well, I'd have to see the invoice. But in that general time we were selling to them.

Q. I don't believe this was asked of you on direct; at least, I didn't hear it. Did you have something to do with the preparation by a lawyer of the May 4, 1942, Warlick-Siuslaw contract?

A. Not to my recollection.

Q. Do you know who drew it?

A. I happen to know who drew—or whose firm name is on the contract because I have seen the contract. But I don't know which one of the attorneys in the firm drew it. [267]

(Testimony of Wilford H. Gonyea.)

Q. And you would only know it from what you have seen on the contract and not otherwise?

A. Yes.

Q. And you had nothing to do, then, with the preparation and drawing of that May 4, 1942, contract as far as you know? A. That's right.

Q. Did you happen to read that May 4, 1942, contract before it was executed?

A. I wouldn't remember, sir.

Q. You have no way of knowing?

A. I couldn't remember whether I actually read it. I undoubtedly did, but I am not specific on it.

Q. Did you know then that all you acquired under the contract was the merchantable timber?

A. Well, we acquired the timber that was on the land. That's what we bought.

Mr. Dezendorf: I don't think that's an answer to my question.

Mr. Biggs: I think that's an answer, if the Court please, because merchantable timber may very well, and this—and in this case we contend it does, mean just that.

The Court: Ask him another question. I am not going to strike that one. But ask him—get more specific with him if you want.

Mr. Dezendorf: All right. [268]

Q. Did you know at or about the time the May 4, 1942, contract was executed that it conveyed only the merchantable timber?

Mr. Biggs: Just one moment, if the Court please.

(Testimony of Wilford H. Gonyea.)

That calls for a conclusion of law. I think if Counsel wants to ask in the words of the contract itself. If he was familiar with that wording, I'd have no objection. But to ask him if he knew it required only merchantable timber puts the witness in the position of having to decide what is merchantable timber within the meaning of Mr. Dezendorf's definition. I think it calls for a conclusion.

The Court: I think that the thing is objectionable for another reason, the use of the word "only."

Mr. Biggs: Yes.

The Court: That indicates they bought something less than all. And the witness has already testified that he bought all.

Mr. Dezendorf: May I ask another question, your Honor?

The Court: All right; go ahead.

Q. (By Mr. Dezendorf): Mr. Gonyea, at or about the time the May 4, 1942, contract was executed did you know that it provided that Siuslaw agreed to purchase and remove all of the merchantable old-growth and second-growth fir and hemlock timber?

A. That was the customary provision in any contract for the [269] purchase of timber.

Mr. Dezendorf: I don't think that's an answer to the question.

The Court: Are you reading from a contract? Is this the contract?

Mr. Dezendorf: I am reading from the language of the contract.

(Testimony of Wilford H. Gonyea.)

Mr. Husband: If the Court please, I don't think Mr. Dezendorf—if he is going to ask that question, I think he ought to ask it in the words of the contract.

Mr. Dezendorf: I did. I am reading from Paragraph 3 of the Pretrial Order.

Mr. Husband: "Now growing."

Mr. Biggs: Just read the whole thing, Mr. Dezendorf, and put quotes before and after it.

The Court: Paragraph 3 of the——

Mr. Dezendorf: Of the Pretrial Order, the Agreed Facts.

The Court: Let me see the contract. " 'All of the merchantable old-growth and second-growth fir and hemlock timber, either standing or down, and now growing or located' upon the real property above described * * * "

Mr. Dezendorf: That's correct.

Q. Did you know, Mr. Gonyea, at or about the time that the May 4, 1942, contract was executed that Siuslaw agreed to purchase and remove all of the merchantable old-growth and [270] second-growth fir and hemlock timber?

Mr. Biggs: Now, standing, laying or growing—do you want to give him the whole thing, Mr. Dezendorf, or is that important to you?

Mr. Dezendorf: Well, it isn't important to me.

Mr. Biggs: I object to it, if the Court please, because if he goes to call for the witness' construction of the contract he should use the words of the contract.

(Testimony of Wilford H. Gonyea.)

Mr. Dezendorf: I am not asking for the construction; I am asking him if he knew that's what the contract provided.

The Court: Well, then, I am going to sustain the objection on the ground it's words taken out of context. I think that you have been asking him if he knew that the contract provided thus and so.

Mr. Dezendorf: And trying to quote it, yes.

The Court: All right. All of the merchantable old-growth and second-growth fir and hemlock timber either standing or down and now growing or located upon the following described real property.

The Witness: Yes.

The Court: Go ahead and ask him your question.

Q. (By Mr. Dezendorf): Do you know that it so provided? A. Yes.

Q. Mr. Gonyea, is it a fact that the Forest Service in the Siuslaw area was the biggest owner and seller of timber in that [271] area in 1942 and subsequent thereto?

A. They were substantial.

Q. Were they not the largest?

A. I am not familiar with it, offhand. There is a lot of private holdings on the south side of the river and the Forest Service was on the north side.

Q. I see.

A. And whether it was in the Alsea watershed or the Siuslaw is another matter.

Q. Do you know as a fact that the first sale of

(Testimony of Wilford H. Gonyea.)

second-growth timber by the Forest Service, Mapleton office, was in 1943? A. No, I did not.

Q. Did your company while you were with it ever buy any second-growth from the Forest Service?

A. We bought very little timber from the Forest Service. Our timber was almost entirely on private purchase, and I can't recall a specific purchase of Forest Service timber.

Q. I believe in direct examination you said that your understanding of the conversation between Mr. Warlick and Mr. Davidson prior to the execution of the contract was that cedar trees were to be expressly excluded. Did I understand you correctly?

A. There was a discussion to that extent, or to that point, yes. [272]

Q. That was supposed to be incorporated in the contract, as you understood it?

A. No. They agreed in bargaining that we were not to get the cedar trees.

Q. Both you and Mr. Davidson were aware of that?

A. Yes. I would like to—may I amplify that?

The Court: Go ahead.

The Witness: That is the memory that comes back to me of the discussion of this. And as much—I am sure that that was part of the discussion I heard. I can't remember specific words that were said to that effect. But in the general bargaining like they would bargain back and forth about second-growth, in connection with the value of the tract

(Testimony of Wilford H. Gonyea.)

the question of cedar came up and "The cedar down there is poor and we don't want it."

Q. (By Mr. Dezendorf): Well, did I understand your direct examination correctly that you say there was no conversation about old-growth or second-growth?

A. As to—depending upon the interpretation of what the discussion was to be. There was no discussion as to the values—relative values of the two species.

Sure there was discussion about second-growth in that Mr. Davidson would bargain for the stuff.

Q. Isn't it a fact Mr. Davidson told Mr. Warlick he didn't want any second-growth? [273]

A. Well, he was bargaining.

Q. Did he say that?

A. He was bargaining.

Q. Did he say that?

A. Not in my presence.

Q. He didn't say that?

A. Not in my presence, not that I remember in specific words.

Q. Was there anyone else in your organization there in May of 1942 who would have handled the contacting of a lawyer to draw this May 4, 1942, contract other than Mr. Davidson and yourself?

A. It could have been—I wouldn't have—that wasn't within my premise down there in the position I was in. It could have been my father or it could have been Mr. Lewis—Mr. Joe Lewis in Seattle. It could conceivably have been Mr. Lewis'

(Testimony of Wilford H. Gonyea.)

partner, Mr. McKee, too, who came down quite often.

The Court: Have all the lawyers in that Harris, Bryson firm been contacted to find out if they drafted the contract?

Mr. Biggs: Mr. Husband can answer that better.

Mr. Husband: May I answer that?

The Court: Yes.

Mr. Husband: When this case was first started, the trouble first arose over it, Mr. Manley Strayer and I first [274] went to Mr. Judge Harris and then to Mr. Bryson. I have not talked to Judge East. But I know perfectly well that it was Judge East that drew that contract.

The Court: He told me he didn't.

Mr. Husband: Well, I think he would have to see it. But there is nothing—I think we are all trying to shy away from that contract now because it's a respectable contract.

The Court: I am not.

Mr. Husband: I just think that Judge East drew it.

The Court: There is a name of E. N. Eisenhower on it. Did he draw the contract?

Mr. Biggs: Is that on the cover?

The Court: Yes. E. N. Eisenhower, Puget Sound Building, Tacoma, Washington.

Mr. Husband: That's his copy.

Mr. Biggs: I think the original one is on Harris, Bryson & East.

(Testimony of Wilford H. Gonyea.)

The Court: Yes. It's his name on there. All right.

Mr. Biggs: Well, to finish that, did you talk with Mr. Bryson and Judge Harris, both?

Mr. Husband: We have talked to them both, and I am just as sure as shooting that Judge East drew the contract.

Mr. Biggs: I wonder if Judge East has ever seen the original contract.

The Court: It came up because I told him I thought that [275] I would try this case whether he came down to Eugene or not, because Mr. Dezendorf and Mr.—what is your name again?

Mr. Biggs: Hugh Biggs. Haven't been married since we started this.

The Court: I told him that I talked to you two fellows and you had suggested that I had better try this case because he might have drafted the contract. He says, "Oh. I don't have any recollection of this man Seaver." But at that time I never knew that Warlick was the man who was the owner of that tract.

Mr. Biggs: Yes.

The Court: And I didn't read the pretrial order till I got down to Eugene. So maybe I will talk to him again.

Mr. Biggs: I think sometimes if a law——

The Witness: He told me he couldn't remember it in connection with Warlick either.

The Court: Oh.

(Testimony of Wilford H. Gonyea.)

Mr. Biggs: He'd have to see the contract. Sometimes a lawyer——

The Court: He has told Mr. Gonyea he doesn't remember Mr. Warlick either. The only thing he told me, he said that he recalls that he had done some work for Mr. Gonyea. That's the only thing he recalls.

The Witness: Yes.

Mr. Dezendorf: No further questions. [276]

Redirect Examination

By Mr. Biggs:

Q. Just to leave it perfectly clear—I don't want to beat a dead horse, but in view of the statements or the questions that were asked you about what the contract provided, in your statement that you were familiar with that proposition of the contract which the Court has read to you—I will ask you this question: Was that inconsistent in your mind with your thought that you were getting all the timber on the property?

Mr. Dezendorf: I would object to that.

The Court: Objection overruled.

Mr. Biggs: That's all.

The Court: This comes under the same line of interrogation as to what his intent was. And I know that you have an objection to this whole line of testimony.

Mr. Dezendorf: Well, I objected to that on the grounds that it was argumentative and calling for a conclusion.

(Testimony of Wilford H. Gonyea.)

Mr. Biggs: Which?

Mr. Dezendorf: This last question.

The Court: All right. Objection overruled.

The Witness: It was.

Mr. Dezendorf: I am sorry. I didn't hear it.

The Witness: It was.

The Court: He answered that it was. All right. Ask the question over again. I will tell you what it was. It was: [277] Was there any discrepancy between the statement that I read to you and your understanding of what you were to get?

The Witness: No.

Q. (By Mr. Biggs): That is, you thought that that provision of the contract gave you all the timber on the land, is that correct?

Mr. Dezendorf: I would object to that question, your Honor, and I ask that the witness' answer be stricken until I can make my objection.

The Court: All right. He has answered. He denied——

Mr. Biggs: I think we phrased it differently. I think I said "consistent" and you said "inconsistent," or the other way, calling for a different—that is the reason I wanted the question read.

The Court: No. His answer is based upon the fact that cedar was excluded.

The Witness: Well, my answer to it was this, sir: I understood was there any conflict in the wording of this contract that was read with what I thought that we were going to get, including all of the timber that we were supposed to get off the land, and I couldn't see any inconsistency with it.

(Testimony of Wilford H. Gonyea.)

The Court: All right.

Q. (By Mr. Biggs): You thought under that contract——

The Court: I think he has answered that question.

Mr. Biggs: Very well. That's all, then, Mr. Gonyea. [278]

Will Mr. Phelps take the stand, please? Is there any desire to hold this witness?

The Court: Do you want Mr. Gonyea?

Mr. Dezendorf: No.

The Court: Mr. Gonyea, you are excused from any further attendance at the trial.

(Witness excused.) [279]

ORVAL PHELPS

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

The Court: How many more witnesses do you have?

Mr. Biggs: I was just counting up. They are all lined up here. Mr. Gibson will be the next witness. Mr. Gibson and Mr. Graham. Before the company witnesses—I was going to try to get the others in before I put on company witnesses. Probably five or six.

The Court: Five or six? Well, I was just going to tell you—when are you going to have your rebuttal witnesses here?

(Testimony of Orval Phelps.)

Mr. Dezendorf: Well, I take it that he doesn't expect to finish tonight.

The Court: He will not finish today.

Mr. Biggs: Probably not, your Honor.

Mr. Dezendorf: We will have them here in the morning.

Direct Examination

By Mr. Biggs:

Q. You have stated your name. Where do you live, Mr. Phelps?

A. I live in Eugene now.

Q. How long have you live in Eugene?

A. About four years.

Q. I should have said Lane County. How long have you lived in Lane County?

A. Sixty years. [280]

Q. Sixty years. That's getting pretty near to your age, isn't it, Mr. Phelps?

A. Pretty close.

Q. What is your occupation at the moment?

A. Retired.

Q. What has been your occupation during most of your active life?

A. Logging and lumbering on small scale.

Q. In what areas, Mr. Phelps?

A. The Western Lane County area.

Q. Being even more specific, could you identify it with reference to Mapleton?

A. Deadwood Creek, Indian Creek, and in the Mapleton—close Mapleton area where our last mill was, which now is Mr. Davidson's mill.

(Testimony of Orval Phelps.)

Q. How long were you engaged in operations in that area? A. Beginning in 1926.

Q. Yes.

A. And continuously until we sold the mill to Mr. Davidson in 1954.

Q. '26 to '54, is that correct?

A. (Witness nods head.)

Q. Referring to Defendant's Exhibit 51, being a vicinity map of Lane County, I will ask you, Mr. Phelps, if you can identify your location on that map with respect to the Seaver [281] tract and to Mapleton, and I will direct your attention to the left end over there?

A. This little Post Office, Reed, right here was our mailing address from 1935 till the Post Office was discontinued: The year I don't remember.

Q. Now, Reed is in the northwest—oh. That's in— A. Here is 10. 10. 16, 10.

Q. In Lincoln County? A. No—yes.

Q. That would be the northwest section of Lane County, is that correct?

A. These look like our operations right here (indicating).

Q. You are indicating an area marked out in yellow? A. That's right.

Q. All right. Now, where is Mapleton from there? A. Oh, it's on down to—

Q. Circle it if you find it, or you may use your reference. A. Right in here is Mapleton.

Q. Are you familiar with the tract of land that is the subject of this controversy, this so-called

(Testimony of David Phelps.)

Seaver or Washick tract? A. No, sir.

Mr. Briggs: You do not know where that is. I believe that has been identified your Honor as the section in red.

Q. Was that so pointed out to you when you saw the map originally? [182]

A. That's right.

Mr. Briggs: Do you want to see this, Mr. Devenant? It's just a vicinity map and I just wanted to locate his operations with respect to—

The Court: His operations are marked in yellow?

Mr. Briggs: Yes.

The Court: The Mapleton is marked with a circle?

Mr. Briggs: If that has not been altered, I would like to.

The Court: What number?

Mr. Briggs: 32, I believe.

Mr. Devenant: It's already been received.

Mr. Briggs: Has it been marked 32,000?

The Clerk: Yes. It hasn't been marked, but it has been received.

The Court: All exhibits to which there were no objections have been admitted in evidence.

Mr. Briggs: And the Reporter can complete the record.

The Court: Let's get down to—

Q. (By Mr. Briggs): Were there other locations in this same area? Did you have other mills than

(Testimony of Orval Phelps.)

this precise place? A. Only one at a time.

Q. Only one at a time. Now, let's take the one that you were operating nearest in point of time to the years prior to and during 1942. And where was it located? [283]

A. That would be in the Reed area.

Q. That would be the area that you just pointed out, is that correct?

A. (Witness nods head.)

Q. Now, what was the nature of that operation? Just describe it to the Court if you will.

A. You mean what did we produce?

Q. Yes, sir.

A. Mostly 3 by 12 bridge plank and railroad ties. The cut was pretty much balanced between those two in volume.

Q. Did you own and operate a mill?

A. Yes.

Q. At that area? A. Yes.

Q. What was the source of your timber, your own ownings, or were you buying logs?

A. In that mill we were buying logs by stumpage plan.

Q. From timber owners, is that correct?

A. Owners. We did not buy the land.

Q. Doing your own logging?

A. Some of it we logged ourselves, and some of it we bought in form of logs on roll-away and then we trucked ourselves. Had a small operation. And there was quite a variety of how the logs actually got there.

(Testimony of Orval Phelps.)

Q. What kind of timber were you buying? [284]

A. Exclusively second-growth.

Q. Nothing but second-growth?

A. Nothing but second-growth. It was a small mill.

Q. Yes. And what——

The Court: You said a small mill. What do you mean, 50,000, twenty-five?

The Witness: Under twenty.

The Court: Under twenty.

Q. (By Mr. Biggs): Under 20,000 board feet a day? A. (Witness nods head.)

Q. Over what period of time, now, did you operate that mill?

A. That mill was built in the early spring, February, March and April of 1940, and was operated there until the 14th of July, which was the day it burned.

Q. Of what year? A. Of '44.

Q. Of 1944? A. '44.

Q. To whom were you selling your end products?

A. Such companies as—I believe we sold some from there to Nebraska Bridge and Supply Company. We sold some to the Munroe Lumber Company in Eugene. I am—yes. I am quite sure that we sold some from that mill to Clear Fir Sales.

Q. Did you have a ready market for all of your products from the mill during those years? [285]

A. Yes, sir.

Q. And had you at other locations during——

(Testimony of Orval Phelps.)

A. Yes, sir.

Q. —your years of operation from 1928 until 1944? A. Yes, sir.

Q. Yes. Was there any particular change in marketing conditions, say, from '41, '42, '43—

A. Except that the market—the price got a little better. But the materials were acceptable, I would say, through the same channels. But the war brought on, of course, better prices. And that was about the only change I would—

Q. Had you logged out this area near Reed that's marked on the map in yellow prior to the fire?

A. Not all, no.

Q. Did you subsequently log it out?

A. After the mill burned we did log the rest of it and take it to where the mill was located next.

Q. Yes. Approximately how many thousand board feet of timber did you buy for your mill at the Reed location?

A. Possibly—possibly 5,000,000 feet.

Q. That you logged out over a period of years?

A. Four years.

Q. Exclusively second-growth, is that correct?

A. Over the four years, I believe so.

Q. What other locations did you have or did you operate at [286] prior to the acquisition or the setting up of your mill at Reed? You say you had another location.

A. We had—we had an operation on Deadwood Creek. I forget the numbers of that. But it's just east of this Indian Creek country.

(Testimony of Orval Phelps.)

That was still——

Q. When you say “this Indian Creek country,” you are pointing to the map?

A. I am sorry. It was the map that you showed me here on the Judge’s desk.

The Court: The vicinity map.

Mr. Biggs: Yes, the vicinity map.

Q. (By Mr. Biggs): How far would that be from your plant at Reed?

A. The—by road it’s 25 miles. But it’s over in the next township.

The Court: I think we are getting a little far afield.

Mr. Biggs: All right. All right.

The Court: There was one thing I didn’t understand. How long had you been buying second-growth? Was it from 1928 or from 1940? I didn’t understand that.

The Witness: In 1926.

The Court: 1926?

The Witness: Yes.

The Court: To buy second-growth?

The Witness: Right. [287]

The Court: And were you in the area of Reed from ’26 to ’44?

The Witness: If the Deadwood township being just the next township over would be considered—we only moved that far. We just moved from one township to the other.

The Court: All right.

The Witness: The same general area; yes, sir.

(Testimony of Orval Phelps.)

The Court: Now, the operation which is marked in red on the vicinity map is where you were located from '40 to '44, as I understand it?

Mr. Dezendorf: Well, I think you are referring to the wrong map. It's the little one he is talking about.

Mr. Biggs: The vicinity map, the red, actually was identified as the Seaver tract.

The Court: Oh. The green.

Mr. Biggs: To show the relationship.

Mr. Dezendorf: It's yellow.

The Court: The yellow, rather.

Mr. Biggs: The yellow was Mr. Phelps' operation, and the red on the vicinity map was Mr. Seaver's tract.

The Court: You operated there from '40 to '44?

The Witness: I operated—Reed was our address from 1935 to 1944.

The Court: Well, where did you operate on these two tracts which are marked in yellow? What years? [288]

The Witness: That was from 1935 to 1944.

The Court: From '35 to '44?

The Witness: Yes, sir.

The Court: Now, you gave a figure of 5,000,000 feet, and I thought that you referred to the fact that you cut that amount of logs between '40 and '44.

The Witness: If I did, I didn't mean to.

The Court: All right. Now, tell us what the real facts are.

(Testimony of Orval Phelps.)

The Witness: I believe that all that is marked in yellow there would be about 5,000,000 feet.

The Court: And that was in a period of how many years?

The Witness: Nine years.

The Court: Nine years. Fine.

Q. (By Mr. Biggs): And, then, after 1944 you placed your mill and continued operation exclusively in the second-growth until '54? A. Yes.

Mr. Biggs: You may cross-examine. Just one other.

Q. (By Mr. Biggs): Were there other sawmills of your general type and character operating in Lane County to your knowledge exclusively in second-growth? A. Yes.

Q. Could you name some of them, Mr. Phelps?

A. Those—the name of those concerns escape me. For [289] example, there was one operation down there that we called the Irishman. Well, now, that wasn't their name, but we called them that. And that's what comes to my mind.

Mr. Biggs: Schwartz an Irishman?

The Court: Where was it located?

The Witness: It was located right at the mouth of Deadwood Creek, where Deadwood flows into Lake Creek.

The Court: How big a mill?

The Witness: It was about a twenty-thousand mill.

The Court: You said it was less than twenty

(Testimony of Orval Phelps.)

thousand. How much less than twenty thousand that you had?

The Witness: Our cut ran from twelve to eighteen thousand owing to what kind of luck we had that day.

The Court: And how many men did you have employed in the mill?

The Witness: Three in the mill.

The Court: Three in the mill besides yourself, or including yourself?

The Witness: Including myself.

The Court: Three in the mill. And how many others?

The Witness: One on the lumber truck, one on the log truck.

The Court: Fine. It was a small operation?

The Witness: Quite so.

The Court: And you think that that Irishman had a bigger [290] operation?

The Witness: Yes.

Q. (By Mr. Biggs): Are there other operations that you knew about, Mr. Phelps? Does the name Swensen mean anything to you?

A. Swensen?

Q. That's a Swedish name.

A. Roy Swensen was at Swisshome. They cut a mixed flow of logs.

Q. That was a larger operation than either you have described?

A. Yes. He was one of the big boys.

Q. And he was operating prior to and through

(Testimony of Orval Phelps.)

1942, was he? A. Yes.

Q. And any other operators that you know about?

A. There was another small mill, tie mill, ran neighbor to us. One of the proprietors' name was Hendricks. And I don't recall the other partner's name.

Q. Yes. Where was your last mill when you went out of business? Where was it located?

A. On the Siuslaw River three miles down from Mapleton, which is known now as the Davidson Industries Mill.

Q. That is Mr. Davidson, who was on the stand, bought that mill out? A. That's correct. [291]

Q. Was that exclusively a second-growth mill, too?

A. I operated it as such. What it is now I— I don't know just exactly what their practices are. But I opened it as a second-growth mill.

The Court: I don't think that that's important——

Mr. Biggs: Nothing else.

The Court: Ten years later.

Mr. Biggs: No. I just wanted to show it was continuous. That's all.

Cross-Examination

By Mr. Hoffman:

Q. Mr. Phelps, were you raised up in that country where your mill was? A. Yes.

Q. That is, you were born up there?

(Testimony of Orval Phelps.)

A. Yes.

Q. That's one of the old sections of the country, is it not? A. Yes.

Q. From whom were you buying your lumber, do you recall, at that time?

A. You said lumber. Now, I didn't buy lumber.

Q. Your stumpage.

A. You would want names or just general?

Q. Oh, names, if you recall. [292]

A. We bought timber from Ralph and John Taylor, from Charles Beers, from Thomas and Louis Beers.

Q. All right. Let me interrupt. Do you recall how much you paid for it?

The Court: What years are you talking about?

Mr. Hoffman: Well, start at the beginning, Judge, if that's convenient for him.

The Court: Go ahead and start in '35.

Q. (By Mr. Hoffman): Any that you can recall.

A. Our stumpage figure in 1935 was, possibly, 60 to 75 cents a thousand.

Q. Yes. Around 1940 had it gone up?

A. A little. When we moved the mill in the spring of 1940 that timber was to cost us either \$1.20 or \$1.25, and I can't recall now which it was.

Q. All right. Now, your mill, then, was in no way comparable to the mill of Siuslaw Forest Products? A. I should say that's correct.

Q. As a matter of fact, Mr. Phelps, you had a mill that could not handle a large old-growth log,

(Testimony of Orval Phelps.)

isn't that true? A. That's true.

Q. In other words, if you had had the finest old-growth log laying there you couldn't cut it up?

A. As a matter of fact, the occasional one we did sell.

Q. So you just weren't geared to handle old-growth? [293] A. Right.

Q. All right. Now, this area up there (indicating), what do you call it generally? What creek were you on, Indian Creek? A. Yes, sir.

Q. What was the road that served that area?

A. It was a County Market road, not——

The Court: Do you know the name of it?

Mr. Hoffman: Yes, I do.

The Court: Tell him.

Mr. Hoffman: May I approach the map?

The Court: Tell him.

Q. (By Mr. Hoffman): Was it County Market Road 45? A. Yes.

Q. It was established in 1888?

A. I expect that's right. That's a little ahead of me even.

Q. One of the oldest sections that was settled in the county; correct? A. Yes.

Mr. Hoffman: Your Honor, may I exhibit Plaintiff's Exhibit 31 to the witness?

The Court: Yes.

Q. (By Mr. Hoffman): This is a Lane County Market Road map which I think was prepared around 1920. And there appears to be a red circle on one of those roads—Market Road. Is that [294] about the area you were in?

(Testimony of Orval Phelps.)

A. Yes. That's—the road—the road took off there.

The Court: Louder.

The Witness: This—the road changes classification right there (indicating) and goes along both these streams here. And we were up on this stream (indicating).

Mr. Hoffman: If your Honor cares to see it, there is a small road circled——

The Court: What number is that?

Mr. Hoffman: 31, your Honor. I think it's in evidence.

The Court: Fine. And you said you were on this stream. What stream were you referring to?

The Witness: We were on the east branch of Indian Creek. Our operation was on the east branch of Indian Creek all the time. We were on Indian Creek.

The Court: All right. This is in evidence.

Mr. Hoffman: Yes, it is, your Honor.

The Court: All right.

Q. (By Mr. Hoffman): And the significance of the Market Road is that it gets more tax money to keep it up, am I correct?

A. I couldn't tell you about that.

Q. It was maintained by the County?

A. That's what they told us.

Q. What I mean to say is it was not a situation where you had to make your private road to get your lumber back to the [295] market. You came out——

(Testimony of Orval Phelps.)

The Court: Why don't you leave it the way it is? The County was supposed to fix it, but they didn't do a very good job at times?

The Witness: That's right.

Q. (By Mr. Hoffman): Was access to your timber any problem to you at your mill?

A. No. We procured timber reasonably close to the road. We built some road.

Q. Did you build anything like the ten miles into Mr. Seaver's property?

A. (Witness shakes head.)

The Court: He doesn't know where Mr. Seaver's property is.

The Witness: No. Well, by the—I could still say no. We didn't build any such road as that (indicating)——

Mr. Hoffman: All right.

Q. (By Mr. Hoffman): Now, when you were in the early 40's, 1940 and '42 and that time, did you buy any second-growth logs that were produced from the south of the Siuslaw River?

A. No, sir.

Q. Could you have afforded to haul them into your mill? A. No, sir.

Q. Just couldn't have hauled them in, could you? Couldn't get enough money out of them? [296]

A. (Witness shakes head.)

Q. Do you know how far it was by the road from your mill to the Seaver property in 1942?

A. No.

Q. If I told you it would be about 40 miles,

(Testimony of Orval Phelps.)

would you dispute that? A. No.

Mr. Biggs: How far?

Mr. Hoffman: 40.

Mr. Biggs: By road?

Mr. Hoffman: By road.

The Witness: No, I wouldn't.

Q. (By Mr. Hoffman): As a matter of fact, Mr. Phelps, could you afford at that time to haul the second-growth logs into your mill from any distance at all?

A. What was the last few words?

Q. Could you afford to haul a second-growth log at that time into your mill from any distance at all?

A. We did truck five or six miles.

Q. Was that a regular practice?

A. Somewhat regular.

Q. Was that a substantial portion of your cut?

A. Yes.

Q. All right. Now, was that all the time you were up in that area? [297] A. Yes.

Q. Now, most of the time you were adjacent to a County road with your mill; am I correct?

Mr. Biggs: Adjacent to what?

Mr. Hoffman: The County road.

The Witness: I'd say within a mile.

Q. Well, you tell me whatever it is.

A. We had a mill that was about a mile up the road.

Q. Was the other mill on the road?

A. Yes.

Q. Most of the time in the early 40's were you

(Testimony of Orval Phelps.)

on the road? A. Yes.

Q. All right. Now, how far was it from that mill in the early 40's to the railroad? A. 11 miles.

Q. Was that railroad at a place they called—is it Rainrock or Swisshome? A. Yes.

Q. The highway is also there on that side of the river? A. Yes.

Q. And the river itself, is that right?

A. Yes.

Q. Now, what did it cost you to produce your lumber in 1942, do you know? A. No. [298]

Q. Did you have any records? A. No.

Q. As a matter of fact, what you were trying to do was make yourself a job, isn't that right?

A. Yes.

Q. Well, let's say if you had had to pay two, three dollars a thousand and haul it any distance, could you have done it?

A. That could be true.

Q. Now, I think you told me—and I don't want to put words in your mouth here today—that you were getting \$4.50 a thousand for your lumber delivered—or on the car at the railhead; is that correct? A. Not then.

Q. When was it when you were getting four and a half?

A. Let's see—that must have been the late '29 and 30's, maybe '29 and '30, '31; along in there.

Q. When the war came along that strengthened the market, did it? A. That's true.

Q. Do you recall what you were getting for your lumber in 1942, the spring of 1942?

(Testimony of Orval Phelps.)

A. No; not closely.

Q. Would it have been about eight or nine dollars?

A. Could have been from eight—anywhere from eight to twelve. [299]

Q. That would be delivered on car at the railroad, is that right? A. That's right.

Q. Have you ever been into the Seaver tract?

A. No, sir.

Q. You don't know anything about the timber on that? A. Not a thing.

Mr. Hoffman: That's all. Thank you.

Mr. Biggs: That's all. Did you have a question, your Honor.

The Court: No. Are you through with Mr. Phelps?

Mr. Hoffman: Yes, we are.

The Court: Could you tell us one thing? When you were buying second-growth during the years '40, '41, '42, what was old-growth selling for in this particular vicinity?

The Witness: I don't know.

The Court: All right.

Mr. Biggs: Mr. Gibson, will you take the stand, please?

The Court: Mr. Phelps, you are excused if you want to go. We would like to have you here if you want to stay, but you don't have to.

The Witness: Thank you. I will listen.

(Witness excused.) [300]

ROY C. GIBSON

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Biggs:

Q. Mr. Gibson, state your residence and occupation, please.

A. My residence is Albany, Oregon. I am a Consulting Forest Engineer.

Q. I think a Consulting Forest Engineer's duties have generally been explained. Is there——

The Court: Do you know Mr. Gibson, Mr. Dezendorf?

Mr. Dezendorf: I think so.

The Court: Are you satisfied with his qualifications? Go ahead and qualify him.

Mr. Dezendorf: No, for a reason.

Q. (By Mr. Biggs): What field do you specialize in?

A. Oh, problems in the timber industry. Timber cruising, engineering of various kinds, road locations, and things such as that.

Q. What academic training have you had?

A. I am a Forest School graduate in Engineering.

Q. Which school? A. Oregon State.

Q. Yes.

A. I am a licensed engineer, civil, in Washington, and logging [301] in Oregon.

(Testimony of Roy C. Gibson.)

Q. When did you embark on your career at the College?

A. I graduated in 1926 and licensed in '38 first, I think, as a professional engineer.

Q. In what parts of the country have you practiced your profession?

A. I came to Oregon in 1942 from Washington. Most of the time previous to that I had been in Washington.

The nine years previous to that I had been entirely in Washington. And previous to that, Provo.

Q. Were you engaged as an independent forester up there, or were you employed with a lumber company or timber company?

A. From 1933 till 1942 I was logging engineer for Bodell-Donovan, a big operation on the Olympic Peninsula in Washington.

Q. Until when did you say, from '32 to when?

A. From '33 to '42.

Q. Nine years there you were engaged up there?

A. That's right.

Q. What, then, brought you to Oregon, Mr. Gibson?

A. This looked like a more likely country at that time.

Q. Had it begun to cut out up in Washington?

A. That's true.

Q. And had they got into second-growth manufacturing up there to any considerable extent? Do you have any familiarity with it? [302]

A. I don't have too much familiarity with that.

(Testimony of Roy C. Gibson.)

The company I was with had not and it was primarily double——

Q. Where did you go when you came to Oregon?

A. I came to Eugene and went to work for Snellstrom Lumber Company at Vaughn, which is 20 miles west of Eugene here, as an assistant logging superintendent and engineer.

Q. And you remained with them until how long?

A. Remained with them until 1945, when Long-Bell acquired the company, and then I remained with Long-Bell until 1951.

Q. Now, during——

A. A period of nine years.

Q. ——during your first years with them in '41 through '42, particularly, what type of logging was your employer engaged in?

A. Well, they were primarily logging old-growth timber and, principally, a cable-type operation; high-lead logging it was called, although we did do some Cat logging in the summertime in the better ground.

Q. What did the timber stand consist of primarily? Would you describe it just generally? We are interested in showing at this point how it might compare with the timber on the Seaver tract.

A. It was principally an old-growth stand; however, it was characterized as being—having had many burns through it. There were many vacancies or, at least, we called them [303] vacancies then. The second-growth intermingled with the old-growth.

(Testimony of Roy C. Gibson.)

Q. By intermingling, now, could you be more specific? Do you mean tree by tree or——

A. Well, not——

Q. Tract by tract?

A. It's not usually tree by tree. It shouldn't be described as tree by tree, but spots by spots. It's a logging setting, for instance, which might have part of the setting in spots—spots in it of second-growth.

Q. All right. Was there considerable second-growth, then, on the property; is that what I understand you to say? A. Yes, there was.

Q. And hemlock, too?

A. Not much hemlock. It was primarily about 95 per cent fir stand.

Q. Now, would you state whether during those years the company was logging any second-growth timber?

A. Not as a practice. We did log some, yes. We logged some purely—I remember a few instances. But we logged—a percentage of our operation was in second-growth that came with the old-growth due to the nature of the country.

Q. Well, that would be, then, incidental to your logging operation. You take the second-growth that came in with the old-growth, is that correct? [304]

A. That's right.

Q. What use was made of that?

A. It was taken to the mill and sawed.

Q. Sawed into planks or special products, or are you familiar with that?

(Testimony of Roy C. Gibson.)

A. Well, that was sawed into the type of lumber that type of tree would make which is primarily dimension plank and such.

Q. It was not discarded, is that correct?

A. No.

Q. Was it then subsequently marketed?

A. Yes.

Q. The product? A. Yes.

Q. Yes. What is good forestry practice in operating that kind of a stand of timber with respect to clear-cut logging?

A. Well, in operating in that type of a stand in that country it would be an impossibility to log the old-growth only in a good—except in cases where it was purely old-growth. So the only thing you could do was to take the second-growth with the old-growth.

Q. You clear-cut as you went, taking everything that was in a setting, is that right?

A. Not necessarily. Where there was a stand of second-growth that could be economically left, why, we did so in most cases. [305]

Q. That is, if it were exclusively second-growth?

A. Yes.

Q. I am talking about the intermingled stands where you made your setting in an area in which there was both second-growth and old-growth.

A. Then we took it all.

Q. You took it all? A. Yes.

Q. You cleared out the area around the setting, is that right? A. That's right.

(Testimony of Roy C. Gibson.)

Q. Yes. Now, if these were too small to take into the plant, were they burned as slash?

A. Well, we were somewhat careless in those days. Timber wasn't very valuable then; we didn't work it over too much. We left the timber, if that answers your question.

Q. I am talking now about good forestry practices in an area that was cut or a setting that was cut. Did you attempt to leave it clean?

A. There was only one thing to do under good forestry practices, and that was to take everything in.

Q. Or burn what was left? You intended to leave a clear spot, didn't you?

A. That's right.

Q. For reseeding or to eliminate fire hazards and to otherwise [306] make it useful for reforesting? Isn't that what good forestry practice is?

A. That's right.

Mr. Biggs: I think that's all. Oh. Just a minute.

Q. Was there anyone to your knowledge in that area at that time, Mr. Gibson, engaged exclusively in the manufacture of second-growth?

A. I would have to qualify that answer. As I recall, I am certain there were small mills. I couldn't definitely say that I can name one specifically that was operating at that specific time. I feel sure there were.

Q. Well, was Snellstrom, your old employer, at any time in '42 engaged exclusively in second-growth logging?

(Testimony of Roy C. Gibson.)

A. I recall that when I first went there in the spring of '42 they had one side or one part of the operation logging exclusively in second-growth. The reasons for it I don't know. The mill was primarily designed for old-growth, but they were in that case——

Q. Altogether, second-growth that they were bringing into an old-growth mill——

A. That's right. Absolutely.

Q. ——and sawing it up with the big gear that you used for old-growth——

A. (Witness nods head.)

Q. ——operations; is that correct? [307]

A. That is correct.

Q. You say one side. What would a side mean, one——

A. Oh, that's one——

Q. ——or more settings, a series of settings?

A. In this case it was an area of, oh, possibly 40 acres.

Q. Yes.

A. One part of the operation—or one unit of logging operation was logging in that.

Q. I see.

A. And—but the other—but it was in another area.

Q. And Snellstrom was operating two units; one when you first went with him and engaged in second-growth exclusively, and the other in the old-growth?

A. That's right. The one was exclusively in the

(Testimony of Roy C. Gibson.)

old-growth, in the second-growth. The other I don't specifically remember, but it was in the normal operation.

Q. Would you have any idea—I don't want to spend too much time on it—if you recall, about how much timber would have come off of that side, the second-growth side, in the spring or for the entire year of '42 where they're operating second-growth? How long did it take to clean up that stuff?

A. Well, from that 40 it probably ran a mile and a half. Second-growth.

Q. Where was Snellstrom operating with reference to the Seaver tract, if you can tell us? [308]

A. The mill was located 20 miles west of Eugene here on the Willamette side—on the Willamette drainage; however, all the timber came from the Siuslaw drainage.

Q. Oh. The timber was over on the other side of the Cascades but it was brought over east of the Cascades to your mill where——

A. That's right.

Mr. Biggs: That's all. Siuslaw. I said Cascades.

The Witness: Coast Range, yes.

Cross-Examination

By Mr. Dezendorf:

Q. Mr. Gibson, when did you go to work for Snellstrom Lumber Company?

A. In June, I believe, of 1942.

Q. How long did you work for them?

(Testimony of Roy C. Gibson.)

A. They sold out to Long-Bell in 1945 and I was in with Long-Bell.

Q. Now, isn't it a fact, Mr. Gibson, that the Snellstrom Company in 1942 and thereafter avoided, wherever possible, cutting second-growth timber and bringing it to the mill?

A. Yes; I think I could say yes to that. Not quite that strong, but could have. I have just stated that they did log second-growth.

Q. Isn't it a fact that they found in 1942 and thereafter that they could not profitably log the second-growth that they [309] brought in?

Mr. Biggs: I think, if the Court please, I am going to make an objection for the record at this point. We do not concede that profitable characteristic of an operation is any part of merchantability. We think the Court expressly rejected that element.

The Court: Well, I am going to overrule the objection and permit the witness to answer. I excluded this the last time because I wanted to have an unobjectionable question and then I found the witness answered it the same as he would have answered if he had that additional element. So I am going to permit the question now.

Mr. Dezendorf: Would you like the question again?

The Witness: Yes.

(At this point Mr. Dezendorf's last question to the witness was read by the Court Reporter.)

(Testimony of Roy C. Gibson.)

Q. (By Mr. Dezendorf): Isn't it a fact, Mr. Gibson, that Snellstrom found in 1942 and thereafter that they could not profitably cut in their mill second-growth that was brought in at that time?

A. Well, I couldn't positively answer that. Their mill was designed for that type of timber they had which was not second-growth. Whether they knew or whether they lost money on second-growth or made money on it, I don't know. I suspect that they [310] did after the market went up about that time.

The Court: After the market went up? What do you mean?

A. Well, the market was rising then those years.

The Court: And even though they got more money for their lumber you say they discontinued it?

The Witness: No, I didn't say that.

The Court: Well, I didn't understand what you meant by "they probably did because the market was rising." You mean the cost of stumpage was rising?

The Witness: I meant the lumber market.

The Court: I still don't understand. Tell me again what do you mean "the market was rising." The price of wholesale lumber was rising?

The Witness: Yes.

The Court: Well, how could that affect the profitableness of cutting second-growth timber logs?

(Testimony of Roy C. Gibson.)

The Witness: Be more money for the lumber.

The Court: What?

The Witness: Get more money for the lumber, is what I meant.

The Court: I still don't understand.

Mr. Husband: If the Court please, I think he testified that they probably began to get money out of the second-growth in 1945 because the price was rising. I think that's what he said. [311]

The Witness: That's what I meant to say.

The Court: Oh. In '45.

The Witness: '42.

Mr. Husband: From '42 to '45.

The Witness: From '42——

The Court: You start over again.

Mr. Dezendorf: I'd like to. Thank you.

Q. In 1942 and 1943, as I understand your testimony, it was the definite policy of Snellstrom Lumber Company not to take any second-growth if possible; is that correct?

Mr. Biggs: That isn't true. That's a misstatement of the testimony, if the Court please, and I object to it.

The Court: He said in response to an almost identical question that that was putting it a little too strong. But there was a policy wherever they could avoid it to go into old-growth timber.

The Witness: Well, I'd like to state that the mill was designed for the stand that they had, which was primarily old-growth timber.

(Testimony of Roy C. Gibson.)

The Court: We know that. You have already testified to that.

The Witness: That's what they tried to log primarily.

The Court: No. The question that Mr. Dezen-dorf asked you can be answered in the affirmative that generally speaking they did try to avoid second-growth stands. [312]

The Witness: That's right.

The Court: That's right.

Q. (By Mr. Dezen-dorf): You did at that time, did you not, that Snellstrom found out that they could not make money on the second-growth timber that they brought in and put through the mill?

A. Well, I didn't know that. I knew generally there was less profit to that than the old-growth.

Q. But you didn't know it as a fact that they found out that they lost money on the second-growth they brought in? A. No.

Q. And you first came to Oregon in June of 1942? A. That's right.

Mr. Dezen-dorf: That's all.

Mr. Biggs: Maybe I misunderstood your direct testimony.

Redirect Examination

By Mr. Biggs:

Q. I thought you said the company purposely and deliberately was operating a side of second-growth, exclusive operation, in 1942. Did I mis-understand you?

A. No, you did not. That's quite definite. I re-

(Testimony of Roy C. Gibson.)

member that distinctly, that they were operating in second-growth, purely second-growth at that time. But it was this one side.

Q. I see. Well, they didn't avoid that stand, then? [313] A. No.

Q. Was that an exception to what you were saying, that generally they tried to avoid it?

A. Yes, I think that would be about right. They generally tried to avoid it because their mill was designed otherwise.

Mr. Biggs: That's all.

(Witness excused.)

Mr. Biggs: Call Mr. Graham, if you [314] please.

FRANK A. GRAHAM

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

The Court: What is this witness going to tell us?

Mr. Biggs: This witness is a specialist, if the Court please, in the lumber industry in Lane County for many years. He is a distinguished man in the field. He will testify what the retail market was for second-growth operations from 1928 almost to the present time. I anticipate that's what his testimony will be.

The Court: I thought you were objecting to the profitableness of the operation as a test?

Mr. Biggs: I am, your Honor. I am. I am only attempting to show since the—it's been made that

(Testimony of Frank A. Graham.)

there was a demand for it. Now I think whether or not these people were making money or losing money by it in a particular instance is unimportant. If there was a market for second-growth timber, then, even by the most technical definition that Counsel is using of merchantability, this was merchantable. We say this is only a subsidiary position to our main position that the intention of the parties is controlling, in any event, your Honor. But, if there is any question about whether second-growth was marketable or merchantable, then we are prepared to show that it was extensively used.

The Court: All right. Go ahead. [315]

Direct Examination

By Mr. Biggs:

Q. Your name is Frank Graham and you live in Lane County, Oregon?

A. That's right.

Q. How long have you lived in Lane County, Mr. Graham?

A. Since August, 1924.

Q. August what?

A. 1924.

Q. What is your occupation?

A. Well, I am a partner in a lumber operation at Jasper, California, the Hills Creek Lumber Company.

The Court: Which lumber company?

The Witness: Hills Creek.

The Court: Hills Creek.

Mr. Biggs: Throw your voice out a little bit.

(Testimony of Frank A. Graham.)

We get street noises through the windows here and it's a little——

Q. How long have you been engaged in that business?

A. I came to Eugene at that time and accepted jobs as an accountant with a combination wholesale and manufacturing lumber concern.

Q. Have you been actively engaged in a similar business since that time, Mr. Graham?

A. Ever since.

Q. Yes. What professional association activities have you [316] engaged in during these years?

A. Do you want all of them?

Q. Oh, we don't want you to overdo it, but so that the Court will have some idea about your experience and extent of it.

A. I served on the Board of Directors and as an officer, Treasurer, Vice-President and President of Willamette Valley Lumbermen's Association. That probably covered a period of ten years. I was also on the Board of Directors of many special committees of the West Coast Lumbermen's Association and was Treasurer of that organization for six years. At one time I was a member of the Board of Directors of the National Lumber and Manufacturers Association.

Q. Yes. What are those professional associations engaged in?

A. Well, of course, the National Lumber Manufacturers Association involves all producing species of lumber in the United States.

(Testimony of Frank A. Graham.)

Q. Well, in that connection and in connection with the operation of your own business and in your experiences during these years in Lane County, are you familiar with what uses—commercial uses have been made and the extent of such use of second-growth fir timber in this area?

A. Well, I do have such familiarity.

Q. Will you just describe to the Court in your own words [317] what those conditions were with particular reference to the year 1942 and the period immediately preceding that?

A. Well, it's going to be very difficult to cover these questions specifically and pointedly because there are so many other matters that affect these questions that I am going to ask your Honor to enlarge upon them.

Q. We are turning you loose and then people can stop you.

A. You have to bear in mind that up until 1936 or '37 every mill in this country starved to death.

Q. Started what? A. Starved.

Q. Starved.

A. Even the largest—one of the largest mills in this county didn't make a profit until about 1940—'40, I would say.

Q. Yes.

A. And when you are talking about the relative situations about whether you're going to cut a second-growth tree or an old-growth tree, they are relative as far as I am concerned because it all depends on the market situation.

(Testimony of Frank A. Graham.)

Shall I go on? Am I bothering you?

The Court: You are not bothering me. I have to be here until 5:00 o'clock anyway.

The Witness: The witness just ahead of me who was a logger and an engineer was asked a question about whether or [218] not a mill made a profit on selling second-growth. Well, that was a tough question for him. The answer to that thing would be this: With the market available for that second-growth log, he could make more money on it than he could on some of the old-growth he was cutting. Carshell—42-foot carshell—and they were at that time for the Pacific Express Company—I happen to remember the people that bought that type of timber—and the price on that particular item would be twice what a plank was, such as the former man testified—as the mill man.

Mr. Biggs: Mr. Phelps.

Mr. Dezendorf: I think I am going to have to ask that questions be asked so that we can speed this along and protect our record.

The Court: Let him answer the question. You do the best you can and we will give you some latitude.

Q. (By Mr. Biggs): What was the utilization in terms of specific end products being made of second-growth in 1942 and the year preceding—immediately preceding that, if you can answer the question?

A. Well, you can frame an entire house with second-growth lumber and it's probably just as good

(Testimony of Frank A. Graham.)

or better than old-growth if it's handled properly. The structural strength of that particular piece of wood is just as good; the grade is better.

Q. Was it being used, in fact, for construction of houses [219] in 1941 and '2 and the years preceding? A. In considerable quantity.

Q. What other end products, then, Mr. Graham?

A. Well, I mentioned this one special item that goes in the framework of a refrigerator car which is 42 to 44 feet long.

Q. You are speaking now of specialized products? A. That would be——

Q. That would be even more valuable than old-growth timber, is that correct?

A. That's right.

Q. All right. Let's keep to that category. Are there any more of those specialized types of products that have an unusual value for such growth?

A. Well, of course, you take a—as long as you get enough density in a second-growth log you can make crossarms out of them—that's the arm that goes across the light poles and telephone poles, and that sort of thing—which is also in a special category and brings a very fine price. Now, it does have a ring specification, that item.

The Court: Let me try some other questions on you. What did your mill do? You were the president of a lumber company.

The Witness: No, I was—well, I am in a partnership, so I am not a president. [320]

The Court: You are in a partnership.

(Testimony of Frank A. Graham.)

The Witness: And General Manager of that particular partnership now.

The Court: What was the name of the company?

The Witness: Hills Creek Lumber Company.

The Court: Oh.

The Witness: Now, the original company—I have been with two companies. My original company was the Lewis Peters Lumber Company, who officed in this town, and they were in a combination business of wholesaling and manufacturing.

The Court: All right. Now, in 1938 and '39 and '40 and '41 and '42 what business were you in?

The Witness: Well, I was——

Mr. Biggs: Answer generally. Just tell him——

The Witness: I left this original concern—I have been with two concerns in my own private business. I was a stockholder in this first firm when I left there in 1938 in May and then I became a general partner with the Hills Creek Lumber Company at that time, and I have been with them ever since.

The Court: All right. We will start in 1938. What did the Hills Creek Lumber Company do?

The Witness: What do they do? They have a little sawmill that cuts about three boxcars of lumber a day; in other words about a 75,000-capacity mill. [321]

The Court: What kind of logs were they cutting?

The Witness: We were in the Hills Creek basin

(Testimony of Frank A. Graham.)

and one of the finest old-growth stands of virgin timber.

The Court: Yes. Was there any second-growth at that time? Were you cutting any second-growth?

The Witness: Only in such spots as Mr. Gibson described. If it was in a bush or someplace, there might be a minor percentage of second-growth in that area.

The Court: Well, in connection with your trade association did you know the market for second-growth?

The Witness: Oh, yes.

The Court: Now, were you also wholesaling lumber?

The Witness: Not in those years.

The Court: What years were you wholesaling?

The Witness: The last wholesale experience I had was, possibly, in 1934.

The Court: Well, can you tell us what the market for second-growth was in 1940 and '41?

The Witness: Well, that was a very broad market, sir, your Honor, because at that time lumber was becoming not necessarily scarce but there was not enough production of lumber to care for the wants of the trade, the demand. And that was because of the scarcity of manpower and money and those things, which we all know.

The Court: In '40 and '41? [322]

The Witness: That's right. In '41 the Government started to procure lumber for the—in '40 they started to procure lumber and that was the time

(Testimony of Frank A. Graham.)

that the influx in the demand began to become prevalent enough to bring the price of wood up.

The Court: What was old-growth selling for on the stump in 19——

The Witness: You are talking about stumpage now?

The Court: Yes.

The Witness: Well, specifically, we bought a very fine section of timber, I believe, in the year 1940 from the Booth-Kelly Lumber Corporation for \$1.75 a thousand, on which we—on our estimate of cruise. Now, it was a flat price.

The Court: And was it accessible timber, close to a road?

The Witness: It was adjacent to our logging area. And we were right in the area and we were right up against it.

The Court: All right. What was second-growth selling for, if you know, during that same period?

The Witness: Well, I would guess that second-growth was probably——

The Court: Well, I don't know what——

The Witness: Well, I have to guess because I wasn't buying any. And all I would know——

Mr. Biggs: If you don't know, just say so, Mr. Graham. [323]

The Court: So you don't know what they were paying for the lumber?

The Witness: No—now, wait a minute. Lumber and stump——

The Court: I mean the stumpage.

(Testimony of Frank A. Graham.)

The Witness: Lumber and stumpage is two different things.

The Court: You don't know what they were paying for stumpage?

The Witness: No, I do not.

The Court: Do you know how great the demand for second-growth lumber was during the years 1940 and '41?

The Witness: Well, now, there is a great distinction between those two years. '40 was the year that the United States Engineers started procuring lumber for the defense purposes. And from that time on the demand kept getting stouter and stouter and the production, if anything, lower because of the lack of manpower. And——

Q. (By Mr. Biggs): Was it good in '41? I think that would help.

A. It was much better in '41 than it was in '40.

The Court: And how about in '42?

The Witness: Still better. But, now, there is something. If I may go on, here is a point that hasn't been brought out: Prices were set, if you remember, about that time. So, unless you were cheating, why, everybody got the same kind of a price [324] for the commodity.

The Court: For second-growth and old-growth?

The Witness: It didn't make any difference whether it was second-growth or old-growth.

Q. (By Mr. Biggs): So that second-growth from '41 and '42 on, the retail market was just as good as the old-growth retail market?

(Testimony of Frank A. Graham.)

A. Definitely.

Mr. Biggs: Yes. I wondered if the Court would bear with me to develop a little more widely these end products. We were talking about specialized products, and then you were talking about siding.

Q. Now, what is dimension lumber? Was there any particular market for second-growth dimension lumber?

A. That would be the item that I was talking about. Because when a retail yard wants to buy a carload of 2 by 4 16's and they're scarce, why, they will kiss you to have the second-growth just as quick as they would the old-growth.

Now, there are some things wrong with second-growth but, then, there is nothing wrong with it when lumber is scarce than when there is a market for it.

Q. Yes. Do you know of any sawmills in Lane County that were exclusively engaged in the manufacture of second-growth lumber in '40, '41, '42?

A. I know of them. [325]

Q. I know that. I don't mean—I know you weren't engaged in them. But do you know mills that were doing that, Mr. Graham?

A. Yes, sir.

Q. Will you name them, as many as you can think of right offhand? A. In Lane County?

Q. Yes, sir.

A. Well, in this town—now, what was the year again, sir?

(Testimony of Frank A. Graham.)

Q. Well, let's take '42 if you can confine it right to '42. But '41 would be acceptable, or '40.

A. We didn't have very many sawmills in Eugene at that time. I think at one—probably about the turn of the '40's there were probably about five sawmills in this town and it later got——

The Court: He didn't ask for Eugene.

Mr. Biggs: I said Lane County, sir. If you could name some in Eugene and go to other areas, do it, but——

The Witness: That's almost—excuse me.

Q. (By Mr. Biggs): Well, were there lots of them or just a few? A. There were——

Q. Could you say that?

A. There were——

Q. A lot of them? [326]

A. There were.

Q. Could you name a few specifically?

A. Well, the ONeil Lumber Company, in Eugene, the Lane-Gatcher, I believe, was the name. There were two Lane-Gatcher mills. Walters-Bouchon operated in this town.

The Court: And these were using second-growth?

The Witness: They were using any log they could get. And, of course, second-growth was about all they could get.

Mr. Biggs: All right.

Q. Potters? Do you know a Potters?

A. Well, Potters operated in second-growth through generations, the father and then the sons. I can't tell you what year. They probably cut out

(Testimony of Frank A. Graham.)

over in the Coburg hills about that time, somewhere around the late 30's or early 40's. And they moved, then, and I don't know what the Potter Brothers cut at Walker.

Q. Do you know a Matlock? Archie Matlock?

A. Yes.

Q. What was he operating?

A. Well, Matlock—and I heard another name mentioned, Roy Swensen—his previous operations were at Siuslaw, had been in Toledo. A man by the name of Krohn and a man by the name of Christenson all were second-growth operators. Some of them lasted until the war years, and some of them didn't.

Q. You mean cut out before the war years? [327]

A. Either cut out or went out of business.

Q. We would like to have them as nearly as possible in the 1942 era. What about a Pat Dunning? Do you know him?

A. Yes. But that goes farther back, sir.

Q. Oh. He had cut out before 19——

A. Yes.

Q. ——41? Did the situation change, then, materially except as the market fluctuated up and down as to the desirability of second-growth lumber from 1928 until 1941 or '2?

A. Well, I hate to be—to talk too much to answer a question, but I have to give you a comparison. It's the same thing as in the automobile industry today. The Chrysler people probably can't sell as many cars as they want to because the market slowed up on them. The same thing is true of the

(Testimony of Frank A. Graham.)

2 by 3 by 8's, and to the 2 by 4 by 8's, the market was not very good. In fact, many mills were down because of that.

Q. Following your analogy, has there been continuously a demand for second-growth timber subject to market fluctuations from 1928 to 1945 or beyond as there has been for automobiles?

A. I would have to answer that yes. I have never known of a time that you couldn't sell second-growth lumber.

Mr. Biggs: That's all.

The Court: Wait a minute.

Q. (By Mr. Biggs): Well, I will ask you, have you bought and sold a lot of second-growth lumber now while you have been in [328] the wholesale business?

A. Well, I will have to explain that. I was an accountant with this wholesaling concern until about 1930, when I was moved up to the sales desk. And from that time on for two or three years I did trade in that type of lumber.

Q. Ninteen when, '38?

A. From '30 to '34.

Q. '30 to '34?

A. And after that time I was not in the whole-sale lumber business.

Mr. Biggs: All right. That's all, Mr. Dezendorf.

Mr. Dezendorf: Could we have just a minute?

The Court: All right.

Mr. Dezendorf: No questions.

The Court: That's all.

Mr. Biggs: That's all.

(Witness excused.)

Mr. Biggs: Are you going to really work right on through to 5:00 o'clock?

The Court: Do you want another recess or something?

Mr. Biggs: Well, I was just thinking—I thought maybe five minutes now would save a little bit more time if I could have just that to reorganize these witnesses. They have gone a little bit faster than I anticipated.

(Recess taken.) [329]

Mr. Biggs: Call Mr. McPherson.

The Court: Mr. McPherson.

FRANK W. McPHERSON,
produced as a witness in behalf of the Defendant,
being first duly sworn by the Clerk, was examined
and testified as follows:

Direct Examination

By Mr. Biggs:

Q. What is your residence and occupation, Mr. McPherson?

A. I am a resident of Gold Beach, Oregon. And I am a Resident Manager for United States Plywood's operation at Gold Beach.

Q. Were you at one time associated or employed by Siuslaw Forest Products Company?

A. Yes, I was.

(Testimony of Frank W. McPherson.)

Q. When did you become employed by them, Mr. McPherson?

A. I first became employed by Siuslaw Forest Products in March, 1946. And I was employed by Siuslaw Forest Products until the change of company's name, the ownership, in approximately 1953, I believe it was, when it became United States Plywood. And I was with that organization until December of 1955 when I moved to Gold Beach.

Q. As I understand it—you know you can say so if you don't [330]—do you know what the details were of the acquisition by U. S. Plywood of Siuslaw Forest Products?

A. I didn't get the question, sir.

Q. Do you know the details of the acquisition, how that was acquired or when it was acquired?

The Court: Is there any issue on that?

Mr. Biggs: I don't think so. Is it clear in the record? I will state it through this witness. He can correct it.

Q. U. S. Plywood purchased 52 per cent of the stock of Siuslaw Forest Products before you went to work for them, isn't that correct? They were the majority stockholders, were they not?

A. That's right.

Q. In 1952 all the assets were transferred to U. S. Plywood and Siuslaw Forest Products was dissolved; is that correct?

A. That is correct.

Q. At that time, then, all of the holdings became

(Testimony of Frank W. McPherson.)

U. S. Plywood holdings April 1st, I believe, in 1958, is that correct? May 1st, 1953.

A. I believe that's correct. That's the correct date.

Q. All right. What capacity did you go to work for Siuslaw Forest Products in?

A. I first went to Siuslaw Forest Products in May—correction—March of 1946. I went there as a sort of an engineer to locate and build and construct roads and run property lines and things of that nature in the woods operation. [331]

Q. What technical training or academic training have you had, Mr. McPherson?

A. I was a graduate of Oregon State College in Forestry.

Q. Forestry? A. Yes, sir.

Q. Yes, sir. Prior to that time had you had any woods experience in Oregon?

A. Yes, I had.

Q. What did that consist of?

A. Well, back in the years 1933 to '35 I worked in the logging operation in Clatsop County at the—working in general activity work. After I graduated from school in 1939 I worked up in Washington out east of Seattle on the Snoqualmie area for North Bend Timber Company there and also up on the Skagit for the same company until I went into the service in 19—I will—it was the tail end of 1941.

Q. Yes. During the years that you were in Oregon and before you went into the Army were you familiar with the fir logging in the fir timber area?

(Testimony of Frank W. McPherson.)

A. That's what I was employed at back in the 30's.

Q. In the '30's was there, to your knowledge, any logging of second-growth timber and manufacture of second-growth timber?

A. There was some, yes.

Q. Do you know specific mills that were engaged in that [332] business at that time?

A. My knowledge of it at that time would be so I'd have to answer it No.

Q. In the companies that you were associated with and working for then was the cutting of second-growth simply a part of the old-growth operation—logging operation?

A. That is right. Strictly a logging operation.

Q. Strictly a logging operation. Now, when you went to work for Siuslaw do you know who the manager was at that time?

A. Manager at that time was J. D. McCann.

Q. How long did he remain manager of the company?

A. To be exact I couldn't say, but he was there for a year or so and left to go up into Washington for our same company and also acted as the manager for the Mapleton operation.

Q. Who succeeded him, Mr. McPherson?

A. Mr. E. W. Holmes.

Q. How long was he manager?

A. For a year or so.

Q. Then who succeeded him?

A. Mr. Stevens.

(Testimony of Frank W. McPherson.)

Q. How long was he there?

A. Wallace Stevens. Wallace Stevens came there in, I believe it was, about 1949.

Q. Then there has been a succession of managers within the four or five years after you joined the company, is that correct? [333]

A. That is right.

Q. What new or additional responsibilities were imposed upon you as a result of that succession of managers?

A. Well, when I first started working in the woods I was doing the details that I originally stated, and, as time went on, I was gradually—gradually took over on—was assigned additional duties.

I was for a while the only—practically the only woods employee on the—I mean, that supervised employees on company's woods staff.

Q. Well, how would Siuslaw log, by its own employees or through gyppo contractors, when you went to work for them?

A. They were changing over at the time I went there from company logging to all contract.

Q. What was your responsibility in that? Did you have anything to do with the negotiating with the gyppo contractor?

A. Right at that time, no.

Q. Well, did you assume that responsibility sometime later on? A. Gradually, yes.

Q. Then as a woods supervisor what did you do? You tell us.

(Testimony of Frank W. McPherson.)

A. Well, what years would you like to make?

Q. Starting, we will say, in '45.

The Court: What is the purpose of all this?

Mr. Biggs: I just want—several things. I wanted to [334] show how his responsibilities multiplied, even taking over some of the bookkeeping. But I wanted, then, to show his construction of the road work and the—how the tract was actually logged.

The Witness: I might make it quite brief, if I can.

Mr. Biggs: Sure you can.

The Witness: Your Honor——

The Court: That suits me fine.

The Witness: My original assignment was principally in the engineering of the road systems and developing of roads, construction of roads, as well as running down to the property lines. And that was primarily what I done the first year that I was employed at Siuslaw Forest Products.

Q. (By Mr. Biggs): Were you in charge of the construction of the road into the Seaver tract?

A. That is right.

Q. That was completed in about the fall of 1949, according to this map. I am leading just a little bit. Is that correct?

A. That is correct. The road is constructed——

Q. Then tell us what your logging was in so far as it affected the Seaver tract in 1949?

A. We had—in '49 we probably had about four or five contract loggers working for us. And, as I recall, they were two loggers working in that gen-

(Testimony of Frank W. McPherson.)

eral area, one down in the—what we term the Jump Creek area which, I believe, has been already [335] defined, which is just——

Mr. Biggs: Come over to the map. Just point out, then, if you will, where your first operation was on the Seaver tract.

A. Well, the first operation on the Seaver tract which is shown here in red was when we logged this area in green, which was part of the other—another timber purchase acquirement.

Q. You are talking about an area immediately to the north of the Seaver tract?

A. Immediately to the north and west.

Q. Oh. I see.

A. The topography of that area is such that there is a ridge running approximately through the tract. And in conjunction with logging the timber to the north we also logged the—approximately the north half of that fork.

Q. Yes. All right. Then what was the next show in the logging show in the Seaver tract? When did that start?

A. The next show started in the year 1950. And we progressed the road on down into the Seaver tract and down someplace approaching this township line down—it's shown right here as the fall of '50 (indicating). It was down in this general area.

Q. About where the arrow is marked there "1950"? A. Approximately.

(Testimony of Frank W. McPherson.)

Q. All right. [336]

A. We logged in the same 40 that we had logged the previous year. We came on down.

Q. Taking the south side of it?

A. Taking the south side of it.

Q. All right.

A. Logged along the road—the main road. We projected another road into the draw leading generally easterly through the—generally central part of the Seaver tract and went up the long draw—first long draw to the north which was about two 40's deep or a half a mile long.

Q. I am interested in that draw. That draw was on the east side of a ridge there, was it, running north and south—generally north and south?

A. There was a ridge off here (indicating) to the east of that canyon. It was a series of draws and ridges in that area.

Q. And was your logging in there heavy during the year of 1950? A. Fairly heavy.

Q. Yes.

A. We also logged—I think the road was probably a little further because we came down here and logged in this area (indicating).

Q. Yes.

A. And also in the south of the township line in this area in Section 6, Township South—this is a township line (indicating).

Q. Then in 1951 was there any logging at all on the Seaver tract?

A. There was a small amount of logging in 1951.

(Testimony of Frank W. McPherson.)

Q. Where was it?

A. In the easterly edge of this first 40 that we had touched. I might add that when we logged the north side of the 40 and also when we logged the southerly side we were in there with large yarders, large equipment, and—which was naturally adaptable to the general type of the timber which was predominantly larger timber.

There was a small pocket on this side (indicating) which was left and was logged in the year 1951.

Q. What were the logging season dates, now, for '50? I should have asked you that.

A. We pulled out of this (indicating) tract in the late summer of '50 and moved our operation over into the upper Knowles Creek area to log in what we termed South Canyon Creek——

Q. All right.

A. ——for the winter. We were down there on a—that was a summer road at that time, dirt road.

Q. Now, you have showed us what you did in 1950. What did you do in 1952?

A. I don't know just what—— [338]

Q. On the Seaver tract, I am talking about.

A. On the Seaver tract?

Q. Yes.

A. In the—if I could explain that just a bit by saying that in the winter, December of 1951, there was a terrific windstorm all up and down the Coast and it created a blowdown. And we found that areas down in the Seaver tract had received a considerable amount of blowdown and that in order to

(Testimony of Frank W. McPherson.)

salvage that timber and reduce the fire hazard we went in and started logging some of that timber. We logged some along here (indicating) and some over in there (indicating). We fell and bucked timber and piled the timber. Some of it was hauled in. But right at this time I couldn't say how much was.

Q. Most of the timber on the Seaver place in 1952 that was felled was cold-decked on the tract and hauled into the mill the subsequent year, is that correct? A. That is right.

Q. All right. Now, 1943, was there logging then, too?

A. That is right. We done other logging in that area in 1952.

Q. Well, I am interested primarily in the Seaver tract.

A. Yes. In 1953, then, we went in and picked up those logs that were decked and also logged this tract that was——

Q. Now, indicating the southeasterly 40 there of the Seaver [339] tract, is that correct?

A. That is correct. And the tract over here in Section 1 of the other township and range and started some logging in this area here (indicating).

Q. All right. A. In the most——

Q. Now, 1954 I think it's been suggested that there was a little logging there because of the loggers' strike.

A. We had an operation that started in there

(Testimony of Frank W. McPherson.)

in '53 and intended to take it out in the year—finish it in '54, but the strike took place, I believe, from May through the entire summer, and they didn't get it all out. They had to go back in 1954.

Q. Then in '55 what logging was done?

A. Well, they didn't finish it all. '54 was the year of the strike?

Q. Yes.

A. They didn't finish it all in '54. They came back and finished up what was left in the spring of '55 and that was—there was only a small amount in the spring of '55.

Q. Yes. Then what area did Mr. Seaver log for you and in what year, Mr. McPherson?

A. That I do not know.

Q. Oh. You didn't—

A. That was after I left the operation. [340]

Q. Oh. You left the operation when?

A. '55.

Q. Oh. In 1955. You had nothing to do with the negotiation of the contract with Mr. Seaver?

A. None whatsoever.

Q. Now, if you will just take the stand again—no. Just wait there for one minute. Well, take a seat. In addition to your supervision of your logging activities what office responsibilities did you have during those years?

A. The timber records as they were, tax payments on the timberlands.

(Testimony of Frank W. McPherson.)

Q. What were the timber records, then, that you found when you came to Siuslaw?

A. Well, I found very little when I first—the first year that I was confronted with the task of supplying a cutting record for the previous year. I had very little information on record.

Q. Was there any complete record of the company's holdings supported by accurate data as to the extent of the timber thereon?

A. No, sir. There was a summary showing the timber by tracts and total acreages and a volume for those tracts, but no——

Q. There has been introduced in evidence here a record known as a timber depletion record. Did you set that up, [341] Mr. McPherson?

A. Yes, I did.

Q. In one column under the heading "Volume" are a series of figures by 40's. What did that volume represent?

A. Well, for the most part it represented information that came off of cruise sheets that were available.

Q. Now, that meant the initial inventory or the inventory that you thought the company had when you took it over, is that right?

A. For tracts that hadn't been logged on that cruise information would be the inventory information.

Q. Did you have cruise information for all of it?

(Testimony of Frank W. McPherson.)

A. No, I did not. I was unable to find cruise information for several tracts.

Q. Well, as to areas for which you did not have cruise information how did you supply the data for your initial inventory?

A. I used what information I could find, no matter from what source.

Q. Did you have a cruise made of any of that area? A. None whatever.

Q. Well, then, would you say it was just your best estimate based on such information as was available to you?

A. That would be about it, yes.

Q. And did logging activities in the following years bear [342] out errors in your initial inventory? A. Yes, they did.

Q. In a logging company operation state whether or not you anticipated an overrun or an underrun even on a cruise volume.

Mr. Dezendorf: I would object to that for the reason and upon the ground that I don't see that it has any bearing on any issue involved in this case.

Mr. Biggs: Some question has been made of it from time to time. I don't know that it has been, but inasmuch as they are in evidence I wanted to explain how they were compiled.

The Court: Well, I am going to overrule the objection. I know the answer, anyway, but it's all right. You can put it in. After hearing all these

(Testimony of Frank W. McPherson.)

high-priced experts over a period of weeks I know all the answers.

The Witness: Would you repeat the question?

Q. (By Mr. Biggs): I will ask if there was an overcut or an undercut normally on these cruise——

A. We normally had an overcut.

Q. As you entered on your depletion record, then, the actual count of logs as it was taken off—as they were taken off of a tract, how would you account for the overrun if the logs that had come off equaled or exceeded the initial amount of your inventory? How did you treat it?

A. Well, we actually didn't apply the timber removed to the individual areas. So on the depletion record whenever we [343] removed as much timber as that tract showed we—our normal procedure was to deplete the cruise for each on that particular tract.

Q. Now, Mr. McPherson, did it become your responsibility to watch out for the taxes, to pay the taxes, or did you pay taxes?

A. That is right. Yes, we did.

Q. In that connection did you file certain logged-off affidavits, logging affidavits?

A. Yes, we did.

The Court: You say, "Yes, we did."

Mr. Biggs: Yes.

The Court: Who do you mean "we"?

The Witness: The company did. I filed them.

(Testimony of Frank W. McPherson.)

The Court: You filed them on behalf of the company?

The Witness: Yes, sir.

The Court: You prepared them?

The Witness: At this particular time, yes, sir.

Q. (By Mr. Biggs): Those have been introduced into evidence. And I think the effect of them—at least, the first ones—was that by the year of 1951—by the end of the logging season of 1950 you had logged off all of the timber on the Seaver tract in Section 31, at least, excluding Section 1 and Section 6. Is it the fact that you had logged off all that timber when you filed those affidavits, Mr. McPherson? [344]

Mr. Dezendorf: Just a moment. I will object to that for the reason and upon the ground that it is not proper for this witness to try to explain away the sworn affidavits. We refer to the Hughes vs. Heppner case and also to the more recent case which is in the Advance Sheets, which was decided last month. Bear with me a moment and I will find it.

The Court: I know the section that you are going to read. I read them.

Mr. Dezendorf: I am not going to read the section. It is Kergil v. Central Oregon Fir Supply Co., 66 Ore. Advance Sheets, 651. And I believe under the doctrine of that case it would not be proper for this witness or any other witness to try to explain away the sworn affidavit.

(Testimony of Frank W. McPherson.)

The Court: Objection overruled. This man is not the president of the company.

Mr. Biggs: No. Answer it.

The Witness: Would you repeat the question again, please?

Q. (By Mr. Biggs): The question was had you in fact logged off all of the timber on the Seaver tract by the end of the logging season in 1950?

A. More timber had been removed than we had on our depletion records, our timber records.

Q. Well, what I am asking is had it been removed from the land or did you know whether it then had or not? [345]

A. The volume that we had shown on our records had been removed. And I assumed from the information I had that the tract had been logged.

Q. That is based on your timber depletion records?

A. Timber depletion records and the information available to me.

Q. Yes. Did you then actually know of pockets of timber containing a considerable amount of timber logged in 1952 and '53 in Section 31 that had not been logged off in 1950? A. No, sir.

Q. When did you discover those pockets of timber, Mr. McPherson?

A. The winter of '51 we logged this one tract.

Q. You can come down here to the map and show, if you want to do that.

A. We found that we had left this pocket on

(Testimony of Frank W. McPherson.)

here (indicating) where we had actually shown the depletion for it—that 40 in 1951.

Q. Now, you are indicating by that 40 the most northerly 40?

A. Northerly 40. That, as I indicated earlier, was logged in 1951. Then our attention was drawn after the windstorm in 1951 to this blowdown on some of this little fringe of timber in this area and along——

Q. On the east side of the road in Section 31?

A. And on the south of the creek, at least, going through [346] the east and west through the area. And when we investigated those blowdowns we found that there was timber still remaining——

Q. Yes.

A. ——which we then went ahead and logged. And as we progressed we had to run the property lines on the back side. And we found that there was considerable timber left on the south half of the southwest quarter of 31.

Q. And had those been areas which had been covered by your logging affidavits as having been logged?

A. Having been logged.

Q. Now, take the stand. You were not either an officer or director of the company, were you, Mr. McPherson?

A. No, sir.

Q. Were you acting on the best information that you had at the time in filing the affidavits?

A. Yes, I was.

Q. Did you intend to abandon, relinquish, con-

(Testimony of Frank W. McPherson.)

vey, or otherwise surrender any of the company's rights to any timber that was still on that land by the filing of those affidavits?

Mr. Dezendorf: I object to that for the reason and upon the ground that that calls for a conclusion of law. The actions of the company and their man in filing the affidavits in connection with the contract are what are important and not what this individual, who may now say he had any authority of any kind for the company, may have had in his mind. [347]

The Court: I don't think it's important. Even if he had the intention, he couldn't have abandoned it. But I will let him answer because I am letting all the witnesses answer.

Mr. Biggs: Yes.

Q. Will you answer?

The Court: But I won't place very much credence in that statement.

Mr. Biggs: All right.

The Witness: The answer is: No, sir, I did not intend to abandon any timber.

Q. (By Mr. Biggs): Now, were you responsible for laying out the logging plan each year and directing the areas in which the timber was to be cut? A. Yes.

The Court: It is ten minutes after five now. Obviously this witness is going to be subjected to a fairly long cross-examination.

Mr. Biggs: Yes.

The Court: I think probably it would be a good time to ask Mr. Warlick to come back to permit

Mr. Dezendorf to interrogate him. So will you step down? Mr. Warlick, take the stand.

(Witness temporarily excused.) [348]

MARVIN T. WARLICK

recalled as a witness in behalf of the Defendant, having been previously sworn, was examined and testified further as follows:

Mr. Dezendorf: In that connection your Honor, I have asked the Reporter to transcribe for me at his earliest convenience the questions and answers put to Mr. Warlick ahead of the objection that prompted the conference in chambers which is in dispute. I don't have that available for me. From my standpoint it would be better if that could be done in the morning after the transcript has been made.

The Court: Are you intending to be here tomorrow?

The Witness: Judge, I can be here, sir, if you want me.

The Court: Well, you work for the State of Oregon?

The Witness: I have to go back.

The Court: Fine.

(At this point there was a discussion between the Reporter and the Court.)

The Court: Sometime right before 10:00 o'clock you will be on the stand. So you can go home and vote if you want to.

All right. Now, what about this schedule? How many more witnesses do you have?

Mr. Biggs: I think very few, your Honor. There is a lot more detail that we could go into, but I suspect that we have covered the main issues. And Mr. Sanders could finish [349] up rather shortly. There is a great deal of technical information he has which I had anticipated would be in dispute. But it hasn't become an issue yet. I would want the right to use him on rebuttal, depending on Counsel's showing—or surrebuttal. So I think we can finish up, probably within an hour easily tomorrow, your Honor.

Mr. Dezendorf: May I inquire, are you going to call Mr. Fox?

Mr. Biggs: I think not.

Mr. Dezendorf: Well, will he be available tomorrow?

Mr. Biggs: He certainly will. He has been here at all times.

The Court: Is Mr. Fox connected with the company?

Mr. Biggs: Mr. Fox, yes, is also a company employee and was working with Siuslaw during that time. But his testimony would be quite largely cumulative.

Mr. Dezendorf: Actually, we can use his deposition if it isn't convenient for him to stay.

Mr. Biggs: He is going to be here if you want him on the stand, Mr. Dezendorf, for any particular purpose. I am perfectly willing to put him on

for my witness so you can have the benefit of cross-examination.

Mr. Dezendorf: I was just asking if he would be here.

Mr. Biggs: He will be here.

The Court: Do you think you will be through by noon? [350]

Mr. Biggs: He will be through in an hour. How much more testimony will you have?

Mr. Dezendorf: Well, there is quite a little that will have to either come from Mr. Fox's deposition or from his testimony. I would think that we would take at least two, maybe three hours.

The Court: All right. That's fine. We will start in at 9:00 o'clock, then. We will recess until 9:00 o'clock tomorrow morning.

(At this point the Court adjourned at 5:30 p.m.)

Morning Session

(Court reconvened at 9:00 o'clock a.m. on May 16, 1958, pursuant to adjournment, and further proceedings herein were had as follows:)

The Court: Go ahead.

Mr. Dezendorf: If the Court please, I would like at this time to hand to Mr. Biggs the original of the Forest Service records which are noted in the pretrial order which, at the Forest Service's request, we have photostated because they do not wish the original records to be either marked, if

possible, or be a part of the record because they feel that they are permanent records.

The Court: All right. Any objection?

Mr. Biggs: Not at all. These have been admitted, have they not?

Mr. Dezendorf: No. You see, they were subpoenaed here, and then when we got them here they wanted those.

The Court: The originals are admitted. It is stipulated that the originals may be withdrawn and photocopies admitted and marked in their place?

Mr. Biggs: No objection.

(At this point copies of documents entitled "Timber Sale Record Card" or "Timber Sale Record" were marked for Identification as Plaintiff's Exhibit 32-A.) [352]

(Documents entitled "Report of Timber Cut" were marked for Identification as Plaintiff's Exhibit 32-B for Identification.)

(Plaintiff's Exhibit 32-A and Plaintiff's Exhibit 32-B were then received in evidence.)

Mr. Biggs: Are we ready to proceed, your Honor?

The Court: Yes.

Mr. Biggs: Mr. McPherson, take the stand.

The Court: Where is Mr. Warlick? Isn't he supposed to be here?

Mr. Biggs: I understood he was coming here.

He said he would be here. I wonder if he understood—no. You made it very specific it was 9:00 o'clock. I haven't seen him since the Court recessed, your Honor.

The Court: All right.

(At this point Mr. McPherson, the witness, resumed the witness stand and testified as follows:)

FRANK W. McPHERSON

Direct Examination

By Mr. Biggs:

Q. I think I had asked you, Mr. McPherson, whether you were—when you were logging the Seaver tract you in good faith believed that all of the timber you were taking off that tract was in fact timber belonging to U. S. Plywood. [353]

A. That is correct.

Q. Now, you spoke briefly yesterday about the time and the places that you logged on the Seaver tract. It was not a continuous operation, according to your testimony, from the time you started in there until you completed the logging on the Seaver tract; is that correct?

A. That is right. Day by day. It was not continuous.

Q. Why was the logging interrupted from time to time on the Seaver tract?

A. Well, there were several reasons: One reason would be the road situation in which the last

(Testimony of Frank W. McPherson.)

portion of the road into that area was a summer-type road, it was not hard-surfaced so you could not operate on it during the late winter months; and, also, the fact that that area as well as other areas were logged in accordance with the requirements of our milling operations.

Q. Yes.

A. We supplied logs for a plywood plant and a sawmill and——

Q. Now, was that the logs that you were supplying for the plywood plant—I mean, just what type of logs were they? What did you call them?

A. Peeler-grade logs.

Q. What is a peeler-grade log?

A. Well, I don't know whether you want the complete answer on that or not. But the scaling rolls—— [354]

Q. Well, just generally how does it differ from—a saw log, I presume, is the other category?

A. High-grade logs free from knots, certain diameters, sizes.

Q. You might describe for the record—I am sure the Court knows it—but how is a peeler log processed in the plant?

A. In the operation at Mapleton the peeler logs were rotary-peeled; they were put on a lathe and turned and turned against a knife. The logs are first cut into 8-foot lots, I should explain, and put into a lathe and turned and turned against a knife, and the resulting product is a thin veneer which is used in the process of—further process of laying up

(Testimony of Frank W. McPherson.)

into—in gluing into plywood, cross-laminating into plywood.

Q. Does that process leave a log core, then, after several layers have been peeled off? is there a log core left out of the peeler log?

A. Yes, there is a——

Q. What use is made of that?

A. It's put into lumber.

Q. Then treated as a saw log, is it?

A. Yes.

Q. Then is the saw log the other type of log that comes out of an operation of this kind?

A. Saw log or pulp log.

Q. Yes. What is the saw log? [355]

A. Well, that would be all the other fir logs that are too rough, knotty, defective, to be peeled in the peeling operation.

Q. How is it processed in the mill?

The Court: What is the relevancy of this?

Mr. Biggs: I was just showing your Honor—he said the mill inventory—that he would go to places——

The Court: Well, talk to him some other time.

Mr. Biggs: All right. If the Court is not interested in it, it doesn't make any difference to me.

The Court: All right.

Q. (By Mr. Biggs): How do the requirements of these various kinds of logs affect your logging plan?

A. We had to adjust the areas into which we put loggers to maintain our inventory ahead of the

(Testimony of Frank W. McPherson.)

various plants. Our consumption of peeler logs was approximately the rate of 100,000 a day, and our saw logs at the rate of about 125,000-140,000 a day.

Q. Did you treat the Seaver tract separately and specially, or was that treated as just a part of an entire unit out there?

A. It was part of our entire holding.

Q. We have shown on the map in green and red logging lands immediately contiguous to the Seaver tract. Were other lands not shown in color owned by Siuslaw or the timber on them owned by Siuslaw and subsequently U. S. Plywood immediately contiguous to the whole area?

A. Yes, sir; many acres, particularly due north and northeast of that tract in the whole—practically the whole area covered by the northeast corner of that map was——

The Court: Do I understand your testimony to be that from time to time you would send your loggers into the Jump Creek area and take No. 1 or peeler logs off the Seaver tract as well as the adjacent tracts as one operation?

The Witness: As one operation, yes.

The Court: And then you would move out and, perhaps, at a later time take out saw logs from another area but part on the Seaver tract and part on the adjacent tract?

A. We would do it in various combinations, yes sir.

The Court: All right.

Mr. Biggs: You may cross-examine.

(Testimony of Frank W. McPherson.)

Cross-Examination

By Mr. Dezendorf:

Q. Mr. McPherson, as I understand it, you first came to the Mapleton area to work for Siuslaw in March of 1946? A. That is correct.

Q. Your title or capacity at that time?

A. I presume you could call it logging engineer, woods engineer.

Q. Was there a logging superintendent over you at that time? [357] A. No, sir.

Q. So that in addition to being a logging engineer you were actually the logging superintendent, were you not, that had charge of all of the logging operations of the Siuslaw Company?

A. Not at that time I didn't have all those duties.

Q. Well, who was the logging superintendent over you?

A. There was—there was no logging superintendent. The Manager at that time would have been the—my immediate supervisor. There were at times—about that time there was another man or two that worked various times as contract supervisors.

Q. But I take it that you had charge of whatever logging was done for the company at that time?

A. Not in 1946 when I first went there.

Q. Well, who did have in 1946, then?

A. Mr. McCann. J. D. McCann, the Manager.

(Testimony of Frank W. McPherson.)

Q. Well, when did you become the top man so far as the logging operations were concerned?

A. I received the official capacity as logging superintendent at the time Mr. Stevens came to the operation.

Q. All right. Can you give us any kind of a date on that?

A. Oh, about 1948. 1948 or '49. About that time. November of '48.

Q. So that it would have been before any logging operations were performed on the Seaver property, is that correct? [358]

A. That's correct.

Q. So that at the time the logging commenced on the Seaver property you were the logging superintendent of the company?

A. That is right.

Q. And you had charge of whatever logging was done there and were overseeing that operation?

A. That's right.

Q. Now, when did you cease overseeing the logging, if you ever did?

A. I never did in its entirety until I left in 1955.

Q. So that actually during the time that the Seaver property was logged from '49 to '55 you were the man in charge of the logging operations for the company?

A. That is correct.

Q. Now, toward the end you had managerial duties of the mill itself along with your logging responsibilities, did you not?

A. That is right.

Q. Now, when did those commence?

(Testimony of Frank W. McPherson.)

A. That would be in, I believe, the year 1952 when the present—or the then Manager, Mr. Stevens, died. I was assigned those duties.

Q. So that from 1952 when Mr. Stevens died until you left in the late summer, as I recall, of 1955 you were the top operating Manager of the mill and the woods operation for the company on the ground, were you not? [359]

A. That is right.

The Court: Was there a Manager over you on the ground?

The Witness: No, sir.

Q. (By Mr. Dezendorf): I take it you were the Manager, were you not? A. I was.

Q. And you were the chief executive officer that was there? A. Yes.

Q. Yes. And I notice that these timber removal affidavits which are Exhibit 4 are executed by you before a Notary Public as the duly authorized agent of Siuslaw Forest Products, Inc.

Would you like to hand these to the witness, please, so that he may verify those?

(Whereupon the Crier did as requested.)

Q. (By Mr. Dezendorf): If you will look at the first paragraph up there—it's where it says you are the duly authorized officer of Siuslaw. Do you find it? A. That's right.

Q. And at the time you executed those you were the duly authorized officer of Siuslaw to execute them, were you not?

(Testimony of Frank W. McPherson.)

Mr. Biggs: Well, if the Court please, my objection is to the use of the word "officer." He has testified he was not an officer.

Mr. Dezendorf: We will say agent. I didn't intend it, Mr. Biggs. [360]

Mr. Biggs: I am sure you didn't, but I wanted the record to show that we weren't acquiescing.

Q. (By Mr. Dezendorf): At the time you executed those affidavits on behalf of Siuslaw, Mr. McPherson, you were the person authorized by it to execute and file them, were you not?

A. I filed them.

Q. Well, you were the one that was authorized to do it, were you not?

The Court: Well, by whom were you authorized?

The Witness: I am afraid I couldn't say that I had a direct authorization from anyone to file these.

Q. (By Mr. Dezendorf): Well, did you swear in those affidavits that you were——

The Court: Well, obviously he did swear to it. But there is a little difference. You are asking him for a conclusion——

Mr. Biggs: That's right.

The Court: ——as to whether he was authorized. I don't think you can show it from him; but, suppose he does admit that he was authorized? What is that going to prove?

Mr. Dezendorf: Well, someone had to be authorized to do it and, apparently, this was the man.

The Court: Well, that's an inference that you draw from the fact—— [361]

(Testimony of Frank W. McPherson.)

Mr. Dezendorf: That he swore that he was.

The Court: Yes. But I think that you have already shown that he was the Manager of that operation. If that carries with it the authority to make the affidavit, then he has been authorized. If that doesn't carry with it that responsibility or that privilege, then I think you will have to show that he got authorization someplace else.

Mr. Dezendorf: Well, the point I am trying to make is that I believe it is proper to show when an agent is on the stand what the extent of his authority was.

The Court: That's fine.

Mr. Dezendorf: You can't do it by extrajudicial statements, I understand that. But when the agent is in court and on the stand I think we are entitled to try to prove his authority through him.

The Court: Yes; but not by a question which calls for a conclusion.

Mr. Biggs: That's right.

Mr. Dezendorf: Very well. Let me take another run at it, then, please.

Q. At the time those affidavits were executed, Mr. McPherson, which are before you, to your knowledge was there anyone else connected with Siuslaw authorized to execute them on its behalf?

Mr. Biggs: It was what? [362]

Mr. Dezendorf: Authorized to execute them on its behalf.

Mr. Biggs: I object to that for the same reason that the authorization is a conclusion of law. If

(Testimony of Frank W. McPherson.)

Counsel wants to ask him did any officer of the company direct him to do that, and who, I would have no objection to the question because I think it would be competent for the agent to prove authority by direct statements; that is, the facts from which the inference might be drawn.

The Court: I think that the question is a loaded question. You asked him "if anyone else," which implies that he was authorized. That's the very point that you are trying to inquire about. You can't assume his authority by asking him this additional question. I am going to sustain the objection.

Q. (By Mr. Dezendorf): Who was your superior, if anyone was, at Siuslaw at the time those affidavits were executed and filed by you?

A. This one marked January, 1951?

Q. Well, that's the first one. You will have to take them one by one.

A. In January, 1951, Mr. Stevens was the General Manager.

Q. Did he know that you filed those affidavits?

A. I'd say yes, he knew that.

Q. Did he object to your filing them? [363]

A. Not to my knowledge.

Q. Now, take the next one; who was your superior, if any, at the time you executed the next one?

A. The next one is for the same year, January, 1951.

Q. So your answer would be the same on that, is that correct?

A. That's correct.

(Testimony of Frank W. McPherson.)

Q. Now, take the next one.

A. January, 1950.

Q. Who was your superior then, if there was one?

A. The same man.

Q. Did he know that you executed and filed that affidavit?

A. As far as I know, he did.

Mr. Biggs: I take it, if the Court please, that's not responsive. I think that that would call for a direct answer. He either knew or didn't know whether the—who his superior was.

The Court: Well, can you say he knew or didn't know?

The Witness: I don't believe I can.

The Court: Did you talk it over with him?

The Witness: To my knowledge, I didn't.

The Court: Did you hand him a copy?

The Witness: No, sir.

Q. (By Mr. Dezendorf): Well, copies were retained in the company's files, were they not? [364]

A. I am sure they should have been.

Q. Yes. Now, what is the next one?

A. That's January, 1951, again.

Q. So that would go in accordance with your first answer; right? What is the next one?

A. That's all.

Q. Now, turn them over and get the white ones. What is the date on that one?

A. Here is one, December 31, 1953.

Q. Does that one bear your signature?

A. No, sir.

Q. What is the next one?

(Testimony of Frank W. McPherson.)

A. December, 1953.

Q. Does that bear your signature?

A. No, sir.

Q. What is the next one? Then we are back to where we started, are we not?

A. No, sir. There is December, 1955.

Q. Does that bear your signature?

A. No, sir.

Q. What is the next one?

A. December, 1954.

Q. Does that bear your signature?

A. No, sir.

Q. All right. Now, are we back to where we started? [365] A. That's right.

Q. In 1950, as I understand it, you were the logging superintendent for Siuslaw; is that correct, Mr. McPherson? A. That is correct.

Q. So that you had charge of the logging operations that were conducted, is that correct?

A. That's right.

Q. Did you consider it a part of your duties to file the timber affidavits at that time, after the logging had been completed? A. Yes.

Q. Now, when you came there in March of 1946, Mr. McPherson, I take it that the mill at Mapleton of Siuslaw was in operation; is that correct? A. That is correct.

Q. Were you familiar with the fact which Mr. Davidson alluded to yesterday that that mill had been bought up in Washington and disassembled and brought down and reassembled at Siuslaw, or

(Testimony of Frank W. McPherson.)

did you know that? A. I had heard that.

Q. What type of mill was it in March of 1946, with respect to the type of logs that it was designed to cut?

A. It was a mill that would handle up to 40-foot-long logs—from 12-foot to 40-foot in length.

Q. In length. Now, how about diameter? [366]

A. Any log up to—72-inch opening carriage. So it will take up to 8-, 9-foot logs.

Q. Now, was that mill designed to operate on small-diameter logs? A. Not entirely.

Q. It was basically designed to work on large old-growth logs, was it not?

A. No, sir; large logs.

Q. Large logs. What would you consider to be the lower limit of diameter of a large log?

A. That's a difficult question to answer for that particular mill. Basically, larger logs.

Q. Well, can't you give us some kind of a lower limit as to what a large log would be?

A. You cut logs of all sizes in the mill. I'd presume that the mill was designed to cut logs from about 8 inches to—up to 8 inches in diameter up to the diameter I mentioned. It would probably do—cut more lumber on logs if they were from 15 to 36 inches in diameter than it would on any other size, even including the large ones.

Q. When was the mill put in adjacent to the big mill?

A. There was not a mill put in adjacent to the big mill.

(Testimony of Frank W. McPherson.)

Q. Well, was there a mill put in to cut up smaller logs?

A. Correction. There was; yes sir.

Q. Where was it put? [367]

A. Let me refresh my memory. You are referring to the Huntington mill?

Q. I am talking about the one right in the vicinity of the big mill at Mapleton.

Mr. Biggs: Was your question when or where?

Mr. Dezendorf: Well, I started out by "when" and now I am trying to get "where," because he said he didn't know whether it was adjacent or not.

The Witness: I have to refresh my memory. This is going back. There was a small mill put in alongside of the large mill called the stud mill.

Mr. Dezendorf: All right.

Q. When was that put in?

A. I can't answer it exactly.

Q. It would have been in 1950 or later, would it not? A. I'd have to think.

The Court: Do you know the date?

Mr. Dezendorf: We understand it was '50 or later.

Mr. Hoffman: I think it was 1951.

The Witness: I am trying to recall in my mind. I think it was put there when Mr. Holmes was Manager of the operation. That was before 1948.

Mr. Dezendorf: Is there someone here that would know, Mr. Biggs?

Mr. Biggs: A stud mill? [368]

(Testimony of Frank W. McPherson.)

Mr. Dezendorf: When the smaller mill was put in adjacent to the large mill.

The Court: Mr. Husband, do you know?

Mr. Husband: Yes, I believe I do.

The Court: We have got a man who knows.

Mr. Biggs: If you want to call Mr. Fox, he said it was there when he came there in 1948, the stud mill you are talking about.

Mr. Dezendorf: I don't know if we are talking about a stud mill or not.

Q. What was the type of operation that was there when you came in March of 1946? Was it just the large mill?

A. A large mill and a plywood plant.

Q. All right. And it was sometime after you came that the smaller mill was put in, is that right?

A. This particular small mill; yes, sir.

Q. Now, was there more than one small mill put in besides the big mill? You keep talking about this particular one. I am trying to analyze that.

A. We acquired a larger volume of timber, at which we also acquired the sawmill.

Q. And where was that sawmill located?

A. At Mapleton.

Q. Was that mill that you acquired that you are now speaking of one designed to cut smaller logs, too, as well as the stud [369] mill?

A. It was cutting—I should say that it couldn't cut as large a log as the company's mill.

Q. Well, now, when did you acquire this second small mill that you are talking about?

(Testimony of Frank W. McPherson.)

A. That was either in the year 1951 or '52.

Q. Well, that's obviously the one we are talking about. It would be after 1950, in any event.

The Court: He says either '51 or '52.

Mr. Dezendorf: All right.

Q. So that we have this progression: When you came there in March of 1946 they just had the one large mill which would cut logs up to, I think you said, 9-foot diameter, did you not?

A. That's right.

Q. Then in, perhaps, '48 or '49 they put in a smaller mill to cut studs, is that right?

A. To cut the cores from the peeler plant.

Q. Was that all that went through that small mill was the cores from the peeler plant?

A. I couldn't honestly say.

Q. All right. Then in '51 or '52 you acquired another smaller mill which was designed to cut smaller logs than the big mill, isn't that right?

A. We didn't buy the mill; we got it with the timber.

Q. All right. But, in any event, you got it and you used [370] it; correct?

A. I might qualify that a little bit. We rebuilt the mill.

Q. All right. A. So we could use it.

Q. Fine. But you did use it?

A. That is correct.

Q. Now, talking about the large mill that was there when you were there in 1946, did they run small second-growth logs through that mill?

(Testimony of Frank W. McPherson.)

A. Yes, they did.

Q. When?

A. At all times, to my knowledge.

Q. Even after the small stud mill and the other small mill that you acquired and rebuilt were acquired and were in operation? A. Yes, some.

Q. Do you know whether it was economical from a mill manufacturing standpoint to run small logs through that large mill?

Mr. Biggs: I object to that, if the Court please, as being irrelevant to any issue in the case.

The Court: Well, I have already indicated I am not very much impressed with that testimony. But I am going to let him answer the question anyway.

The Witness: What time are you speaking of? [371]

Q. (By Mr. Dezendorf): Whenever you were running a small one through.

A. I'd say it was economical.

Q. As economical as a large log?

A. No. But if you are going to make every log stand on its own, every log has a different economic factor going through a sawmill.

Q. Now, I believe the map—if I may approach it—has an arrow here in Section 19 with a title after it, "Road here 1942-1946," which is the end of the red line. Do you see the point that I am referring to? A. Yes, sir.

Q. I take it that the road terminated there

(Testimony of Frank W. McPherson.)

from 1942 until 1946, is that what that legend means?

A. Yes. I wouldn't know because I wasn't there during that entire time.

Q. But you came there in 1946 and that's where the road ended, is it not? A. That is right.

Q. All right. So that it might not have been that far in in '42 is what you are saying, is that correct? A. I have no way of knowing.

Q. Right. Now, what type of terrain is covered by the red portion of the road shown on the map? Is it generally sloping or do you go over crests or mountains, or what? [372]

A. Well, the general terrain is typical of the whole area. The road is built up—along the stream bottom.

Q. So that it doesn't go over any mountains on the red part? A. No.

Q. So that it's a more or less gradual grade—upgrade in the red part; correct?

A. Correct.

Q. And what would be the maximum percentage of increase in grade in the red part of the road; 8 per cent, 6 per cent, or what?

A. What do you mean increase in grade?

Q. Well, as I understand it, if a road increases two feet in a certain distance you get a 2 per cent grade; is that correct? A. That's right.

Q. Are you familiar with grades of roads?

A. Yes, sir.

Q. You build them, don't you?

(Testimony of Frank W. McPherson.)

A. Yes, sir.

Q. What is the maximum grade——

The Court: Take off the word “increase” and use the word: “What was the grade on this road?” and he will tell you.

Mr. Dezendorf: Very well. I think it’s either an increase or a decrease, however, your [373] Honor.

Q. What was the maximum grade on the road that is in the red?

A. Probably 10 or 12 per cent.

Q. Would there be more than one place where it was 10 or 12 per cent?

A. I don’t think so.

Q. Generally you were coming up a creek bed, were you not? A. That is right.

Q. Now, take the part that starts in black? How far do you go on the black before you reach a grade that is over 12 per cent?

A. Not very far.

Q. And what is the maximum grade on the black road between the end of the red line and the first portion of the Seaver property where the black line enters? A. Around 15 per cent.

Q. Doesn’t it ever go over 15 per cent?

A. I don’t believe so.

Q. How many mountain ranges or—what do they call them on the map?

Mr. Husband: Ridge.

The Court: Ridges, is that what you are talking about?

(Testimony of Frank W. McPherson.)

Mr. Dezendorf: I will see what they call them here. Yes.

Q. How many mountain ridges do you cross with the black line [374] from the end of the red line to the commencement of the Seaver property?

A. You are crossing but one ridge.

Q. How many times do you cross it?

A. Well, the main ridge that you cross is the ridge between the Jump Creek, Smith River area and the Hadsell Creek or Siuslaw area.

Q. Are you familiar with the cost of construction of any portion of that road?

A. To a certain extent.

Q. Was it—was the building under your supervision and control? A. Yes.

Q. What do you estimate it cost per mile of the red portion of the road?

Mr. Biggs: I am making an objection to this line of questioning, if the Court please. May I have a continuing objection?

The Court: I assume it's relevant so I am going to let it in. I don't know the purpose of it.

Q. (By Mr. Dezendorf): Would you like the question again, or do you have it in mind, Mr. McPherson?

A. Well, I'd have no way of knowing of the cost at the time it was built.

Q. You don't even know the cost at the time you were in control [375] of the building of it?

A. Well, you are talking about the red portion?

(Testimony of Frank W. McPherson.)

Q. All right. Let's forget the red portion. Let's talk about the black portion, then.

A. All right, sir. The approximate cost?

Q. Yes; per mile.

A. I imagine around \$15,000.

Q. A mile, on the average?

A. (Witness nods head.)

Q. Now, there was a period, a lapse of eight years between the time that the black road commenced at the end of the red line until it got to the middle of the Seaver property, is that correct?

A. As I told you before, I couldn't verify that that road stopped in '42.

Q. All right. When did it get into the middle of the Seaver property?

A. In 1950.

Q. According to the map, it stopped on the red part in 1942, is that correct?

A. That's what the map says.

Q. Do you have any reason to believe that isn't a correct representation of the facts?

A. No.

Q. Now, I believe you have said that the Seaver property was [376] logged mainly by contractors for Siuslaw or U. S. Plywood, is that correct?

A. In the main.

Q. During the time that they were logging there you were the logging superintendent or the Manager in direct charge of the logging operations, is that correct?

A. That's correct.

Q. So that you were the one in your organization who was charged with the duty of supervising and controlling and watching the contractors, is

(Testimony of Frank W. McPherson.)

that correct? A. That would be correct.

Q. And you performed your duty in that regard?

A. I intended to.

Q. Did you? A. I think so.

Mr. Biggs: Had you concluded?

The Court: No. No. He just asked him if he did a job all right.

Mr. Biggs: We will admit that, your Honor.

Q. (By Mr. Dezendorf): In connection with your duties in supervising these logging operations, did you go out onto the Seaver property from time to time during the course of its logging?

A. Yes, I did.

Q. And you were pretty well familiar with what was going on [377] there, were you not?

A. Fairly familiar.

Q. You were the one in your organization who was more familiar than anyone else with what was going on there, is that correct?

A. Well, I couldn't say that; no, sir.

Q. Did you have someone under your jurisdiction who had responsibilities with regard to the logging contractors that were performing there?

A. There were several people with responsibility.

Q. All right. Tell us who they were and what their responsibilities were.

A. During that period of time Mr. Fox was in the logging department.

Q. And he was one of your subordinates?

A. That is right.

(Testimony of Frank W. McPherson.)

Q. He reported directly to you?

A. That is right.

Q. And what were his duties?

A. At that particular time he was the man who would be responsible for the road surveying and road construction and working on the property lines, and things of that nature.

Q. But he had no direct supervision or responsibility with respect to the logging contractors that were taking the logs, did he? [378]

A. Right at that particular time I'd say, No.

Q. All right. Now, who else had some responsibility with regard to it that you mentioned?

A. We—most of that timber, I believe, was felled and bucked by employees of the company.

Q. All right. When would that have been? What year?

A. 1949, 1950.

Q. At that time you were logging superintendent, so the company employees were under your direct supervision and control, is that correct?

A. That would be right.

Q. Now, who else?

Mr. Biggs: Keep your voice up just a little bit, please, Mr. McPherson. Sometimes we don't hear you.

Q. (By Mr. Dezendorf): Who else was there you say was a subordinate of yours that had something to do with the logging operations that were conducted on the Seaver property?

A. We had a man in charge of the cutting crew.

(Testimony of Frank W. McPherson.)

Q. That would be during the time that your own employees were cutting, would it not?

A. Right.

Q. Now, let's go over to the time from there when it was being done by contractors for you. Did you have any other subordinates that had anything to do with logging contractors who were logging the Seaver tract other than Mr. Fox that [379] you mentioned?

A. The bull buck, Mr. Crabbe.

Q. Who? A. Crabbe. C-r-a-b-b-e.

Q. And was his duty as a bull buck?

A. He was the actual foreman in charge of the cutting crew.

Q. And he was a direct subordinate of yours?

A. That is right.

Q. And reported to you? A. That's right.

Q. Were there any other subordinates of yours that had anything to do with the logging contractors that logged the Seaver property?

A. I don't believe so.

Q. Even though you had those subordinates out there, you yourself were out there and were familiar with what was going on during the logging of the Seaver property? A. Generally, yes.

Q. Now, did you have—excuse me.

May I have those Conservation Permits which, I think, are No. 5?

(At this point the documents requested by Mr. Dezendorf were handed to him by the Clerk.)

(Testimony of Frank W. McPherson.)

Q. (By Mr. Dezendorf): Did you make application for and procure [380] the Forest Option and Conservation Harvesting Permits with respect to the logging that was performed on the Seaver property, Mr. McPherson?

A. I'd have to answer that that I undoubtedly did for some of it.

Q. Who would have done it when you didn't?

A. Mr. Fox could have done it at times, and also at times the logging contractors would have secured a permit.

Q. Now, in the case when the logging contractors procure the permits, would they consult with you as to the method of logging and whether to leave seed trees or strips or blocks, or would that be their sole responsibility without consulting you?

A. That's—generally they would get that information from us.

Q. So that you would be the one that would try to co-ordinate the method in which seed trees or strips or blocks would be left as this Seaver property and your other properties were logged; is that correct?

A. That is right.

Q. Now, I take it, Mr. McPherson, that as of this moment timber removal affidavits have been executed concerning all of the land involved in the Seaver tract; is that correct, to your knowledge?

A. As of this moment? [381]

Q. Yes; as of now.

A. I think that's right.

(Testimony of Frank W. McPherson.)

Q. Has all of the merchantable timber been removed from the Seaver land?

A. As of this moment?

Q. Yes. A. That I don't know.

Q. Now, Mr. McPherson, were you familiar with the fact that logging operations were conducted on portions of the Seaver tract after timber removal affidavits had been filed with respect to that particular portion? A. That is right.

Q. You knew that that was being done?

A. Yes, sir.

Q. Now, as I understand your statement on direct, Mr. McPherson, you said that you conducted the logging operations on the Seaver property just the same as were conducted on other properties which was owned in fee by Siuslaw or U. S. Plywood. Did I understand you correctly?

A. That would be about right, yes. Every tract has its own peculiarities.

Q. But I mean with respect to the selection of trees, and things of that kind, you logged it just the same as you did property that you owned in fee?

A. Within reason, yes. [382]

Q. You intended to take whatever trees were actually taken from the Seaver tract, is that correct? A. I would say Yes.

Q. Including the cedar that was taken; is that correct? A. I don't know.

Q. What was that?

A. I said I don't know.

Q. Well, what don't you know?

(Testimony of Frank W. McPherson.)

A. Whether we intended to take the cedar or not.

Q. Well, you knew that you took it, didn't you?

A. No, I don't.

Q. You don't even know it now? A. No.

Q. You have never been told that cedar was logged from the Seaver property?

A. I understand that there was some cedar stumps out there, but I know nothing of cedar logs.

Q. How many times have you been on the Seaver property?

A. I have been on or through it quite a few times, sir.

Q. It would be in the hundreds of times, wouldn't it? A. I presume, yes.

Q. And you never saw a cedar tree on the property? A. No, sir.

Q. Never did?

A. Not that I could stand here and [383] declare.

The Court: How many cedar trees were on this 408 acres?

Mr. Dezendorf: Five trees, 8,000 feet.

The Court: Five trees in 400 acres.

Q. (By Mr. Dezendorf): As a matter of fact, weren't the cedar trees right on the edge of the farm land by the orchard? Does that refresh your recollection? A. I don't know.

Q. Do you know where the orchard was?

(Testimony of Frank W. McPherson.)

A. I think there was some fruit trees on the westerly side of the property.

Q. But you don't recall any cedar trees right in the vicinity of the orchard?

A. I don't recall.

Q. All right. I take it, Mr. McPherson, that when the second-growth timber was taken from the Seaver land in the period 1951 to 1955 that you intended to take it and knew what you were taking; is that correct?

A. That is correct.

Q. When, if ever, Mr. McPherson, did you examine the Warlick-Siuslaw May 4, 1942, contract?

A. Well, we had it in our records there all the time.

Q. Were you familiar with it all the time?

A. During the time of this operation, speaking about '49-'50, I'd say Yes.

Q. So that you were familiar with the terms of the May 4, 1942, [384] contract during the time that logging operations were performed on the Seaver tract?

A. Yes.

Q. And it was right in your file?

A. In our file.

Q. And even with that you conducted your logging operations on the Seaver property just as if you owned the fee, is that right?

A. That is right.

Q. Mr. McPherson, even prior to the time logging commenced on the Seaver property you had aerial photographs of the timber on it, did you not?

A. No, we didn't.

(Testimony of Frank W. McPherson.)

Q. When did you first get the aerial photographs?

A. As I recall, the flight was made during the year of 1949. I don't know whether it was completed that year or completed in 1950.

Q. But, in any event, when the flight was completed you procured one of the aerial photographs of the timber, did you not?

A. Some time afterwards.

Q. Didn't you also have type and specie reports of the timber on the Seaver property at some time during the course of the logging operations?

A. No, sir.

Q. Who did the aerial photographing [385] work? A. Delano.

Q. Now, did you have written contracts with the contract loggers who logged the Seaver property in 1949, 1950 and up to 1955?

A. I couldn't say that we did. I don't believe that we did.

Q. Your best memory is that you didn't have, is that correct? A. (Witness nods head.)

Q. Do you know why it was, then, Mr. McPherson, that Mr. Seaver was requested to execute a written contract in connection with his operation on a small portion of his property for your company? A. At what time was that?

Q. In 1955.

A. I might say that conditions had changed within the organization and within the U. S. Ply-

(Testimony of Frank W. McPherson.)

wood. We now have contracts with all of our loggers.

Q. So that you think Mr. Seaver was the first one of those who logged on the property that came under this new policy, is that correct

A. I wouldn't say that. I moved to Gold Beach in 1955 and started operations down there and our loggers—our contractors—and they have contracts written.

Q. Well, you were in charge of the Mapleton office of U. S. Plywood at the time the negotiations were going on with [386] Mr. Seaver, were you not?

Mr. Biggs: You mean for this contract?

The Witness: Yes, sir.

Mr. Dezendorf: Yes.

Q. When did you leave?

A. I left in 1955.

Q. Yes. Give us the dates.

A. December—1st of December.

Q. You didn't know at the time you left that negotiations were going on with Mr. Seaver for a written contract to cut a portion of the Seaver tract when you left? A. I don't believe I did.

Q. You didn't know that contract was dated August 19th, 1955, although it was executed somewhat later? A. No.

Q. Would that have been under your direct supervision, control, as Manager while you were there?

A. It should have been. Pardon me.

(Testimony of Frank W. McPherson.)

Q. Excuse me. Yes?

A. I have to stand corrected, your Honor. During—I wasn't Manager up to—I made a false statement back there. I will have to get Mr. Husband to remember this date. But some time in 1954 a Manager was brought into the Mapleton Division over the plywood, the sawmill and the timber, logging departments, and at that time I severed my relationships with [387] the logging and timber department and handled just the milling operation.

Q. All right. Who was that superior that you talked about?

A. Mr. Demoisee.

Q. All right. So that after he came some time in '54 or '55 you then became what, the Manager of the Siuslaw large mill?

A. I was the sawmilling operation.

Q. That included the three sawmills that we have talked about, then?

A. No.

Q. Which one?

A. The—that sawmill history goes back and forth from pillar to post.

Q. Well, just tell us what ones you were in charge of when Mr. Demoisee came in '54 or '55.

A. At that time we were operating but two mills, I believe.

Q. Were you in charge of both of the sawmills?

A. Yes.

Q. And you still were the logging superintendent of the logging operation?

A. No.

Q. Who was, of the logging operation?

A. Mr. Fox.

(Testimony of Frank W. McPherson.)

Q. Well, was he not one of your subordinates?

A. Up until that time. [388]

Q. Then he came out from under your jurisdiction, is that right?

A. That is correct. I don't think you understand what—that it is——

The Court: He just looks that way. That doesn't mean anything.

The Witness: Could I digress a minute so I can explain to him?

The Court: I think he knows. Don't worry about him.

Q. (By Mr. Dezendorf): Well, I just want to get it clear, Mr. McPherson.

The Court: Well, then, go ahead and explain it to him.

Mr. Dezendorf: I want you to feel happy about it.

The Witness: Well, when I said I was Manager of the logging and milling—sawmilling operations——

Q. Right.

A. There was also a Manager of the plywood operations——

Q. Right.

A. ——acting independently of—on an equal with me.

Q. Right.

A. And I overstepped my time element when I said I was Manager of both operations when I left.

(Testimony of Frank W. McPherson.)

Q. Right.

A. In 1954 a Manager was put in over the entire operation.

Q. Right. [389]

A. And at that time I concentrated my duties on the sawmill and turned the woods part over.

Q. I didn't get what you said.

A. I didn't turn it over; I stepped out of the logging and lumbering—or logging and timber department activities.

Q. Well, who took your place as in charge of the logging and lumbering operations on the property that we are concerned about?

A. Just—not lumbering, logging.

Q. Logging? A. Logging and timber.

Q. Right. Logging and timber.

A. Mr. Demoisee was the General Manager.

Q. Well, but who took over your duties as the superintendent of the logging operation?

A. Mr. Fox.

Q. And he was not, then, a subordinate of yours?

A. No, sir.

Q. A co-ordinate man with you?

A. Correct.

Q. And you think he took over in 1954 some time?

A. That would be the best of my recollection.

Q. Right. There was one thing, Mr. McPherson, mentioned in Mr. Fox's deposition I would like to ask you about. Were there little maps made of

(Testimony of Frank W. McPherson.)

the areas cut and the amount of [390] timber out as the logging progressed on the Seaver property?

A. Not to my knowledge.

Q. Did you attempt to keep any kind of records of what you procured while you were logging superintendent from the various areas that were logged while they were logged? A. Yes.

Q. On what kind of records did you keep that information? A. The log book records.

Q. Now, is that the timber inventory and depletion record that you are speaking about?

A. No, sir.

Q. It's something else?

A. There is some in—maybe I could refer to them differently, logs that were——

The Court: Have you seen that document here in court?

The Witness: Well, I couldn't say I had. It's logs that are where they are scaled by the Bureau.

Mr. Dezendorf: No. Mr. Fox referred to something that you kept which were little pictures or diagrams of areas logged showing what had been taken off that area during the progress of the logging.

Q. Now, do you know anything about that?

A. He would be referring to the timber depletion record.

Q. Well, he talks about pictures. Maybe I can help you on that. [391]

The Court: What page?

(Testimony of Frank W. McPherson.)

Mr. Dezendorf: It's 105, I believe, of his deposition.

The Court: All right.

Mr. Dezendorf: Yes, starting at Line 12.

Q. This will just be to refresh your recollection.

The Court: Here (handing document to witness). Read Line 20.

Mr. Dezendorf: It isn't his deposition.

The Court: I know. I read the Fox deposition this morning.

Mr. Dezendorf: All right. Line 12.

Q. Do you find it? This is of Mr. Fox.

"Q. Now, in connection with your accounting, whether it's at the end of the year or not, do you furnish certain maps showing timber areas and timber cut and that sort of thing?

"A. At the end of the year, sure, we show what has been cut.

"Q. On a map? A. On a map.

"Q. What kind of a map do you use?

"A. Well, it varies. Anything to make a picture, you might say, or show where the cutting is.

"Q. Who requests that of you, Perry?

"A. Well, the same comptroller. [392]

"Q. What are you supposed to show on those maps?

"A. You are supposed to show what has been cut that year.

"Q. You show the area?

"A. The area that has been cut."

(Testimony of Frank W. McPherson.)

I thought there was some place it referred to you here.

A. My answer is the same.

Q. You still don't know anything about those records? A. The timber depletion records.

Q. But nothing other than that?

A. That's what he is referring to.

Mr. Biggs: Mr. Dezendorf, if you will read past the interruption there, I think the witness will clarify it.

Mr. Dezendorf: I though there was a reference to McPherson.

Mr. Biggs: He was referring only to depletion——

Mr. Dezendorf: I thought there was a reference to Mr. McPherson.

Mr. Biggs: On Line 8, 106, he says: "what we show. The only footages I know that we show is for depletion."

Mr. Dezendorf: Here. I find it on Page 107, Line 6—or Line 5.

"Q. What would you have?

"A. Like if we confined these records that we was [393] talkin' about Frank kept and George kept, why, they would be there according to tract and that's the only thing that I can——"

Now, does that mean anything to you about records you kept about the timber that you removed from each portion?

A. That's the same depletion records.

Q. You think that's what it is?

(Testimony of Frank W. McPherson.)

A. Yes, sir.

Q. You know nothing about any annual pictures or anything of that kind or diagrams?

A. Just for depletion.

Mr. Dezendorf: That's all.

The Court: Let me ask you a question. At the same time you were filing removal affidavits on the Seaver tract were you filing removal affidavits on the adjacent properties owned by the company in fee?

The Witness: That is right, sir.

The Court: And subsequent to the time that these removal affidavits were filed on the property owned in fee by the company, was there logging on some of those tracts?

The Witness: I didn't get the entire question, your Honor.

The Court: After these affidavits were filed on properties, tracts adjacent to the Seaver tract, did you go in there and log that property? [394]

The Witness: Yes, sir.

The Court: In other words, you treated the Seaver property identically in the same manner with the property owned in fee by the company?

The Witness: That is correct.

The Court: All right. Go ahead if you want.

Mr. Dezendorf: No more.

Mr. Biggs: I don't think we have anything more. I will ask the Bailiff to show the witness the Defendant's Exhibit now, 6.

The Court: He has got it there.

(Testimony of Frank W. McPherson.)

Redirect Examination

By Mr. Biggs:

Q. I will ask you to examine that and state if you wrote the letter accompanying the check and if you know who issued the check, Mr. McPherson?

A. Yes. I did.

Q. What was that in payment of, Mr. McPherson?

Mr. Dezendorf: I think it speaks for itself.

Mr. Biggs: Very well.

Mr. Dezendorf: It's already admitted.

Q. (By Mr. Biggs): Was that issued following a conference you had had with Mr. Tucker relating to the timber taxes on the property? [395]

A. That is right.

Mr. Biggs: Yes. We offer that in evidence.

The Court: Tucker?

Mr. Biggs: Yes, Tucker, your Honor. That's preceding it. We just simply want the record to show that we paid timber taxes.

Mr. Dezendorf: That's already in the record.

Mr. Biggs: That's all.

The Court: Wasn't there one exhibit that you wanted to see the stub on?

Mr. Dezendorf: Yes, that—and that reminds me of another thing. You remember Mr. Moore was going to give me that comparison, the tax returns with the timber depletion. Has that been completed?

Mr. Biggs: Yes, I am sure that it has.

(Testimony of Frank W. McPherson.)

(Discussion off the record.)

Mr. Dezendorf: I didn't want to put their whole tax returns in because it was silly.

Mr. Biggs: Let me check on that. I won't forget.

The Court: That's all.

Mr. Biggs: Wait just one minute.

Q. Some of the affidavits that have been referred to here that you said you hadn't identified were affidavits signed by Mr. Seaver, I believe, is that correct?

A. That's what it shows. [396]

Q. On the property that was subsequently logged, is that correct?

The Court: Subsequently logged? I don't understand that. I looked at those affidavits.

Mr. Biggs: I don't know. I am just wondering——

The Witness: I presume——

Mr. Biggs: You don't know. All right. We have no further questions.

Mr. Dezendorf: Well, I want——

The Court: Are the descriptions of the property identical with the Seaver tract in controversy?

Mr. Biggs: Which ones?

The Court: The ones signed by Seaver.

Mr. Biggs: Yes.

Mr. Dezendorf: They are prepared by U. S. Plywood and taken to him to sign as the owner. I think we can develop that through this witness if that is a matter in your Honor's mind.

(Testimony of Frank W. McPherson.)

Mr. Biggs: I don't know what the history of those are except that they bear Seaver's signature.

Recross-Examination

By Mr. Dezendorf:

Q. You recall, do you not, that on some occasions timber removal affidavits were prepared by you and taken to Mr. Seaver [397] for his signature as the owner of the land? A. I understand they were.

Q. And they were prepared in your office, were they not? A. I believe they were.

Redirect Examination

(Continued)

By Mr. Biggs:

Q. And he signed them, is that correct?

A. That is correct.

Mr. Biggs: Yes.

The Court: All right.

Q. (By Mr. Biggs): Prior to 1954 were any of the—did you ever see—oh, no. Excuse me. Were you ever shown the actual tax notices on that property—U. S. Plywood or Siuslaw Forest Products, did they receive the tax notices or were they sent to Mr. Seaver?

A. They were sent to Mr. Seaver and he brought them with him when he——

Q. Did they ever carry a breakdown on a timber tax?

A. Not to my knowledge; no, sir.

(Testimony of Frank W. McPherson.)

Q. Or personal property?

A. No personal property.

Q. So you computed with Mr. Seaver from time to time what you thought the timber tax might be; is that correct?

A. That's correct. [398]

Q. Did you ever examine the assessment—continuing assessment roll in Lane County to ascertain whether this land was actually carried by the Assessor on the tax roll as timberland?

A. No, sir; I never did.

Mr. Biggs: Yes. We offer in evidence at this time, if the Court please, Exhibit 67, being a photostatic copy of the continuing assessment.

Mr. Dezendorf: Isn't this already in? I thought it was.

The Court: I don't know. Any objection?

Mr. Dezendorf: Well, I would——

The Clerk: It's in.

Mr. Biggs: It's in all right. That's all.

Mr. Dezendorf: That's all.

The Court: That's all. Any further testimony?

Mr. Biggs: Just one minute. I think we may be through, your Honor. Yes.

Your Honor, we have a matter that we hope to be able to cover by stipulation. It will save quite a bit of time. Go ahead. That's fine. Other than that I have no other evidence that I want to put in and I thought if we might take a recess now——

The Court: Well, let's talk about some other things. What about Mr. Fox? Are you going to put him on?

Mr. Biggs: He is available. I don't know that any—what [399] he would testify to would be largely cumulative.

The Court: What is it you want to find out from Mr. Fox, Mr. Dezendorf?

Mr. Dezendorf: Well, there are several things.

The Court: What page?

Mr. Dezendorf: No. 1, on Page 27, that the bulk of the timber on the Seaver tract was taken in 1950 was cut in 1950.

The Court: Is there any—

Mr. Biggs: I think actually, Mr. Dezendorf, our stipulation covers that.

Mr. Dezendorf: Well, that's what I want, is an admission from him.

Mr. Biggs: Call him if you want to ask him that.

Mr. Dezendorf: The Judge was just asking me what I wanted, and I am trying to tell him.

Mr. Biggs: All right.

Mr. Dezendorf: No. 2, I want the increase in stumpage from 1948 on, which appears on Page 35, his testimony with respect to the timber depletion records, which is—

Mr. Biggs: Call him as an adverse witness.

The Court: He is not putting on his case.

Mr. Biggs: All right.

Mr. Dezendorf: It wouldn't take—

The Court: I have read this deposition earlier this [400] morning after I located it, and most of it is totally irrelevant and pertains to documents and how to get ahold of those documents. I thought

it would be a waste of time to ask him the same questions.

Mr. Dezendorf: Well, I think I could do it very—in a reasonably short time by just asking him if he made these statements as admissions.

Mr. Biggs: I think, if the Court please, then, we have no other testimony that we wanted to offer at this time, save for the stipulation with respect to figures. If we can't work that out, why, then, I want to put testimony on as best we can showing precisely what timber came off of certain areas in years. But if we can stipulate on that, we can avoid wasting time.

The Court: All right. You will rest except for the issue of the figures, the amount of——

Mr. Biggs: That's right.

The Court: All right.

Mr. Dezendorf: The Court may remember that they said earlier that Mr. Sanders would be put back. And I reserved my cross-examination until he was put back. But I just wanted to call that to your attention.

The Court: Mr. Sanders, take the stand.

Mr. Biggs: I didn't mean to cut you off on that, Mr. Dezendorf. [401]

Mr. Dezendorf: I might make this suggestion: The figures that we will have to stipulate on will be testified to by Mr. Sanders. We could save time if we could discuss the figures and then we could eliminate the figures on examination.

Mr. Biggs: If we are going to do that, let's forget the stipulation.

Mr. Dezendorf: I said I am sure what you and I wish to do is see if we can agree on the figures because otherwise he will have to testify to them. If we agree on them, he doesn't; and that will shorten the cross-examination.

The Court: Mr. Warlick is here. Will you please take the stand?

Mr. Dezendorf: The Court will recall that last night I said that I was having the questions and the discussions in connection with the ruling transcribed by the Reporter, which I have done. I am inclined to think that there might be some profit in, perhaps, our having a short conference in chambers before I commence, unless your Honor has some different feeling about it.

The Court: No. We haven't got any chambers here. So go right ahead.

Mr. Dezendorf: Well, my point is I don't want to violate whatever your Honor may think to be the proper ruling that was made in connection with the matter. May I have Exhibit 30-B [402] shown to the witness, please?

The Court: Wait a minute. Leave that over here. On what theory are you asking him these questions?

Mr. Dezendorf: On two: Number 1, your Honor overruled us the opportunity yesterday of showing the document to Mr. Warlick, which we believe if it was available yesterday should be available now if it was an offer made in good faith, which I know it was. In the second place——

The Court: Well, I am going to tell you it was

an offer made by me in good faith which you rejected in good faith at that time, too. And I offered it to you three times and asked you if you wanted to use that against this witness and you turned me down in my chambers and you turned me down in the courtroom.

Mr. Dezendorf: Well, I would think that if the offer were valid yesterday that it should be valid today.

The Court: Well, the rule in this court is that except for impeachment you must exhibit all documents to opposing counsel in advance of the trial. You refused to do so. Yesterday noon in my chambers when I gave you the opportunity it implied that Mr. Biggs was going to see that exhibit. You refused to do it at that time. We went out to the courtroom, I gave you that opportunity again, and you refused. Now after you reject it I don't see how you can ask that it be marked because in my view that's a direct violation of the Rules [403] of this Court. But if Mr. Biggs hasn't any objection——

Mr. Biggs: Here is my objection, your Honor: Let me say, in fairness to Counsel, he showed me the contract yesterday. So I have seen the document. My objection to the continued cross-examination goes to the point, first, that if it is not for impeachment purposes and no proper foundation has been laid for that, it's wholly irrelevant anyway. It does not touch upon any matter that would affect this witness' credibility as to impeachment. It's with respect to a collateral mat-

ter and this being a lay witness there is no basis for an impeaching question if that is what the claim is on a collateral matter.

So I adhere to the original objection, your Honor, as an attempt to impeach, if that's what Counsel claims for it, on a collateral matter.

The Court: I don't know. What do you claim for it?

Mr. Dezendorf: I claim this for it: It shows an entirely different treatment of a similar transaction which bears out the testimony of both Mr. Warlick and Mr. Davidson with respect to the first transaction which was different but is the type of transaction that they were describing yesterday which happened just about twelve months later with respect to another transaction.

Now, it also shows—and both men testified—that they read the first contract, they knew what was in it, [404] and yet it didn't contain what they said their intention was, whereas this one does. I think it has relevancy from several standpoints. As a matter of fact, I think it's one of the most important documents in the case. And if I have made a mistake in the handling of this exhibit I certainly don't want the mistake visited on my client. And I am trying to proceed in good faith.

The Court: You have told me that about three times now. But you have worked on the Rules of this Court yourself, haven't you?

Mr. Dezendorf: I have.

The Court: Yes. And I imagine that you have practiced in the Federal Court as much as any

man in the United States District Court for this District and you are very well acquainted with the rule that a sealed document may only be used for impeachment. This cannot be used for—you couldn't use it for substantive evidence.

Mr. Dezendorf: Well, I thought your Honor said yesterday that you gave me the opportunity to use it for that and I wish to accept it.

The Court: You rejected it. You mean after you rejected it twice yesterday, now because you couldn't get it against Mr. Davidson you want to accept the offer that you rejected?

Mr. Dezendorf: Your Honor, I am merely trying to do my best in this case to comply with your Honor's feelings about [405] the matter.

The Court: Oh.

Mr. Dezendorf: And I may say that after reading this testimony which the Reporter has transcribed I still think it was properly admissible yesterday as an impeaching document. But there is no point in our arguing that again, because your Honor feels otherwise. All I am trying to do——

The Court: Give me the authority upon which you rely. Tell me one case that says it's admissible as an impeaching document.

Mr. Dezendorf: I think that one question would permit it to be put in, the question on Line 24, Page 1:

“Q. Did you sell the merchantable timber on that property to Mr. Davidson?

“A. I haven't read the contract since, probably, the month after I sold it. But it's my understand-

ing—my memory is that I sold the merchantable timber—all the timber on the place.”

Now, I think that in and of itself is sufficient to permit that document go in as an impeaching document.

Mr. Biggs: Well, if the Court please, that’s entirely consistent with that his testimony is here. It’s exactly what——

The Court: I want to tell you something. I have thought [406] it over, and in spite of the fact that I don’t appreciate your failure to accept the offer that I made to you yesterday I am going to let it in and you can proceed with this witness.

Mr. Dezendorf: Thank you, your Honor. May I have the document handed to the witness? By the way, I forgot to say one other thing which might be relevant from the standpoint of the record, if I may, at this time, your Honor. The document concerned is one which has been recorded and is, of course, of public record. [407]

MARVIN T. WARLICK

produced as a witness in behalf of the Defendant, having been previously sworn, was examined and testified as follows:

Cross-Examination

By Mr. Dezendorf:

Q. Mr. Warlick, you have in your hand Exhibit 30-B. A. Right.

Q. Does your signature appear upon it?

A. It does.

(Testimony of Marvin T. Warlick.)

Mr. Dezendorf: I will offer it in evidence.

Mr. Biggs: Only the original objection that I had, your Honor. I don't care about the Rules, particularly. It's irrelevant. It doesn't tend to impeach the witness. It's not inconsistent with what he previously said. It relates to an entirely different transaction. Otherwise——

The Court: Yes. But it's not being offered for impeachment any more. Is that right?

Mr. Dezendorf: I am trying to get it in under your Honor's ruling that it can be used only for substantive evidence and that, perhaps, you have given me another chance.

Mr. Biggs: Well, as substantive evidence, your Honor, it's clearly objectionable. It relates entirely to a different transaction. It doesn't prove or disprove any issue in this case to the agreement that the parties had on the tract in dispute. It isn't drawn by the same lawyer. Different parties [408] entirely. This is Mr. Davidson, who said he was dealing for himself and took the contract to his own lawyer to——

The Court: Well, I don't think it's relevant, but I am going to let it in because I have been letting in a lot of information that I don't think is relevant. But it is admitted.

(At this point a photostatic copy of a three-page document, previously marked for Identification as Plaintiff's Exhibit 30-B, was received in evidence.)

The Court: All right. That's all, Mr. Warlick.

(Testimony of Marvin T. Warlick.)

Redirect Examination

By Mr. Biggs:

Q. Do you know who drew that contract yourself, Mr. Warlick?

A. My memory was that it was Mr. Calkins. S. M. Calkins.

Q. That was Mr. Davidson's attorney? Or do you know?

A. Oh, I think Mr. Davidson—my memory is that Mr. Davidson said, "Have you got an attorney that we could get to draw this?" And I said, "Well, he does all my work and I think he would be glad to do it for you."

Q. Did he take it down there, or do you know?

A. I don't know. [409]

Recross-Examination

By Mr. Dezendorf:

Q. Well, Mr. Warlick, you notice on the outside of that it said "Return to Mr. Davidson," did you not? See at the bottom under the stamp mark there.

A. You mean when it was recorded?

Mr. Dezendorf: May I approach the witness and show him? May I have it a second?

The Court: Yes.

Q. (By Mr. Dezendorf): I am directing your attention to the bottom here on the document, on

(Testimony of Marvin T. Warlick.)

the back, where it says "A. S. Davidson." Do you see that?

A. Well, sir, I think that's what I would do if I was Mr. Davidson. I would—if I took it to the Clerk's office, I'd expect them to return it to me after it was recorded.

Q. You didn't pay Mr. Calkins?

A. I wouldn't know now.

Q. You know that you didn't, don't you?

A. No, I don't.

Q. You have no memory of it at all?

A. Of paying for this contract?

Q. That's right. A. Absolutely none.

Q. If you had paid it, you would probably remember it, wouldn't you? [410

A. No, I would not because I have had lots of dealings fifteen years ago, and I—I don't remember a grocery deal when I pay it.

Q. Did you go in and tell Mr. Calkins what the transaction was?

A. I don't remember. I doubt if I did.

Mr. Dezendorf: That's all.

Mr. Biggs: That's all.

The Court: All right. That's all. You have asked Mr. Davidson to remain. Do you want Mr. Davidson?

Mr. Dezendorf: No.

The Court: All right. Now, Mr. Sanders, you can come forward.

(Witness excused.)

Mr. Dezendorf: I wonder if we could have a minute to see if we can agree on these figures?

The Court: We will take a ten-minute recess.

(Recess taken.)

Mr. Biggs: Could we have two minutes more, your Honor?

(At this point there was a discussion between Mr. Biggs and Mr. Dezendorf.)

Mr. Biggs: It is stipulated by and between the parties that the total volume of timber removed from the Seaver tract [411] after 1950, after the logging season of 1950 was 4,536,000 feet, of which 850,000 was old-growth, 3,239——

The Court: He doesn't want to agree.

Mr. Dezendorf: Just a minute. I am just——

Mr. Biggs: Yes — 239,000 was second-growth. Do you want us to read this so you can hear it, your Honor?

Mr. Dezendorf: I want to know first what you are saying.

Mr. Biggs: All right. 3,239,000, second-growth; 439,000, hemlock. It is stipulated also that those— yes. That's the total, isn't it? That those figures may be taken for the purpose of reckoning the application of any limitations period applying to timber taken off after 1953. Defendant, however, does not stipulate that there was no logging activity on the Seaver tract in 1951 or '52.

Mr. Dezendorf: And we don't concede——

Mr. Biggs: And you don't concede——

Mr. Dezendorf: That there was, according to your——

Mr. Biggs: That insofar as logging activity has any bearing on the issue of abandonment or relinquishment, the defendant contends that there was logging activity; plaintiff denies that there was logging activity. That would be an issue. But the Court need not consider that in considering——

Mr. Dezendorf: If the Court please——

Mr. Biggs: ——after January 1, 1953.

Mr. Dezendorf: ——we were both working under a little [412] bit too much pressure. If I might make this suggestion, we can leave this last thing to do. I think we can accomplish it. If we can't, the only additional man that would have to come back would be their cruiser, Mr. Sanders.

Mr. Biggs: All right.

Mr. Dezendorf: We are going a little too fast, I am afraid.

Mr. Biggs: If the Reporter will prepare a copy at his convenience of the stipulation—just dictate it for Mr. Dezendorf and one for me—then I think we can——

Mr. Dezendorf: I think we can resolve it. And that will——

Mr. Biggs: That will save a lot of time.

The Court: Do you want Mr. Sanders now?

Mr. Biggs: I have no further testimony at this time, if the Court please.

Mr. Dezendorf: We are ready for Mr. Sanders, then, with that understanding. [413]

PAUL SANDERS

produced as a witness in behalf of the Defendant, having been previously sworn, was examined and testified as follows:

The Court: You have already been sworn.

Cross-Examination

By Mr. Dezendorf:

Q. Mr. Sanders, you were the cruiser that was to work with Mr. Jones, our cruiser, in making a joint cruise of the Seaver property, were you not?

A. That is correct.

Q. My memory is that you had some kind of an accident just about the time you were to start. Can you refresh my memory on that?

Mr. Biggs: Had some what, Mr. Dezendorf? I didn't get the question.

Mr. Dezendorf: Had an accident?

Mr. Biggs: Accident?

Mr. Dezendorf: Yes.

Mr. Biggs: Regards what? Will you ask the Reporter to read the whole question? I'm sorry; I just couldn't get it.

The Court: He said he remembers that this witness had an accident just before he was to start with Mr. Jones to make this joint cruise.

Mr. Biggs: Oh. [414]

The Witness: No. I had no accident that I can recall before we started the cruise.

Mr. Dezendorf: Well, isn't it a fact that some-

(Testimony of Paul Sanders.)

one working for you started out on the cruise and then when you recovered you took over and went on?

A. No, that's not the fact.

Q. You don't remember hurting your leg either fishing or something else?

A. I sprained my knee in the process of the cruise, which is a normal occurrence, but it occurred within—during the cruise.

Q. I see. A. But not before.

Q. Then you were off for some time?

A. Not for that reason, however.

Q. For some other reason? A. Yes.

Q. What was the other reason?

A. The cruise—as I said yesterday, the cruise was made under my personal direction and under my responsibility and that I was actually a part of the cruising party for part of the cruising job.

Q. I see.

A. That I was not personally a part of our cruising party during the whole job. [415]

Q. All right. I guess we are all together.

A. That was not for the reason that I sprained my knee.

Mr. Dezendorf: I see. Well, subject to whatever we may have to have if we don't agree on the figures that's all I have now.

Mr. Biggs: I have nothing.

The Court: That's all, Mr. Sanders.

(Witness excused.)

The Court: All right. Rebuttal.

Mr. Hoffman: We would like to call Mr. [416] Buss.

FRED BUSS

produced as a witness in behalf of the Plaintiff, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Hoffman:

Q. Mr. Buss, where do you live?

A. Well, I live about three miles east of Canary.

Q. Where is Canary with relation to Florence?

A. Well, it's about ten miles southeast of Florence.

Q. Have you lived there most of your life?

A. Yes, I have, all my life.

Q. Born up in that country? A. Yes.

Q. Where is that with relation to the property we have been referring to as the Seaver property?

A. Well, it would be, oh, roughly, I'd say, about 15 miles west and a little—probably a little south.

Q. All right. Have you ever been on the property we call the Seaver property?

A. Yes; I built road through it.

Q. Do you recall when you were first there?

A. Oh, that's going way back.

Q. You helped build the first road into it?

A. Well, yes; that you could travel with a car.

Let's see—— [417]

Q. All right. A. ——'23, I think.

(Testimony of Fred Buss.)

Q. All right. Now, what have you done during most of your adult life as an occupation?

A. Well, I was raised as a farmer and went from the farm to logging.

Q. When did you start to log? A. What?

Q. When did you start your logging?

A. Oh, I worked for Vaughn & Bester in 1918, I think.

Q. Have you logged ever since?

A. Well, yes, off and on.

Q. Have you ever bought timber? A. Yes.

Q. Have you logged and bought timber in this general area we are talking about?

A. Yes; around Canary.

Q. Have you ever sold and delivered logs into the Mapleton area?

A. Yeah; we delivered some logs to Forest Products.

Q. Siuslaw Forest Products?

A. That's right.

Q. When was it you first delivered logs to the Siuslaw Forest Products? Just your best recollection. A. Oh, I think about '45 or '46. [418]

Q. All right. Now, do you recall what kind of a log it was?

A. Yeah; it was old-growth or what they called a bastard growth. It was just ripened old-growth.

The Court: What?

The Witness: Just ripened old-growth. It was a bastard—what the foresters call a bastard growth.

(Testimony of Fred Buss.)

Q. (By Mr. Hoffman): Was there a time when you did log second-growth timber in that area?

A. Yes. Oh. I looked up the records and about the earlies that I had any records of, I think, was about '46.

Q. And that would be the first time that you as a logger in the area dealt in second-growth logs; is that right? A. That's right.

Q. Whom did you sell to?

A. Well, we sold to Forest Products and we sold to the LaDuke Lumber Company.

Q. Do you remember how much you got for the logs delivered?

A. Well, this will be an estimate. I think it was about \$18.00.

Q. Prior to that time what kind of a log had you been dealing with?

A. Well, old-growth and bastard growth and cedar.

Q. Did a change occur in the logging area—that is, the logging practices in that area as to what you could log? [419]

Mr. Biggs: If the Court please, I object to any further questions along this line.

The Witness: You will have to speak louder. I can't hear you.

Mr. Biggs: I am speaking to the Judge. In any event, Mr. Buss, I don't mind you hearing me. On the theory that the only pertinency at all, apparently, would be to go to the issue of merchantability. This isn't rebuttal. The plaintiff made its

(Testimony of Fred Buss.)

showing with respect to merchantability on its case in chief.

Our proof was to meet the plaintiff's showing. Certainly they can't come back with another line of testimony, another line of witnesses, to reopen their case in chief for the purpose of——

The Court: Was there testimony that Siuslaw Forest Products bought from Mr. Buss?

Mr. Biggs: No. No, there isn't any testimony on that point at all.

The Court: What is the purpose of this showing?

Mr. Hoffman: This first showing, your Honor, is to demonstrate that there was no dealings in second-growth logs in that area prior to '46 and '47. They maintained that there was and this is evidence to rebut that, to this point.

The Court: Well, I venture to say you could bring in 10,000 people who didn't deal in second-growth logs. But it [420] doesn't make any difference if they can show that they had five people who dealt with it before that time.

Mr. Hoffman: My point, your Honor, is this, to show that there was a change in the area as to what could be utilized. And I——

Mr. Biggs: That's a part of their case in chief, your Honor. They were met with the requirement of showing as a part of their case in chief what timber was merchantable and what was not merchantable according to their definition, according to their theory. They put a witness on, and one

(Testimony of Fred Buss.)

witness on only, which presented their case as to merchantability of second-growth timber.

The Court: Well, how many more witnesses of this kind have you got?

Mr. Hoffman: This is the last one, your Honor.

The Court: All right. I am going to let you open up your case in chief for this purpose.

Mr. Hoffman: All right. We will ask as to merchantability.

Mr. Biggs: As to all other witnesses they want to show on this?

The Court: This is the only witness they are going to use.

Mr. Biggs: I see.

The Court: So I let them open their case in chief for [421] the purpose of putting on this witness.

Mr. Hoffman: Thank you.

Would you read the last question, Mr. Reporter?

(At this point Mr. Hoffman's last question to the witness was read by the Court Reporter.)

Q. (By Mr. Hoffman): Did you understand that, Mr. Buss?

A. What was it, again?

Q. I will rephrase the question. The question is, did there occur a change in that area over these various years as to what you could log, what you could utilize?

A. That's right.

Q. What was that change?

(Testimony of Fred Buss.)

A. Well, when we started logging second-growth we just didn't log it.

Q. Why not?

A. Well, there was no profit in it.

Q. Could you get rid of it?

A. Oh, you could give it away.

Q. Now, from your experience as a logger and buying and selling timber in this area over all these years and—let me ask you this further question: Were you familiar with the timber on the Seaver property in May of 1942 prior to this contract of Mr. Warlick's?

A. Well, I'd been through it a lot of [422] times.

Q. All right. Now, based on your experience as a logger and your knowledge of this particular timber, and based on the economic factors involved, do you have an opinion as to whether or not that second-growth timber on the Seaver land was merchantable in May of 1942?

Mr. Biggs: I object, if the Court please——

The Witness: I am.

Mr. Hoffman: Hold it.

Mr. Biggs: ——to the question insofar as it calls for this witness' opinion, based upon merchantability which I think the cases hold must reflect the intention of the parties under all of the circumstances.

The Court: What do you regard as merchantability?

The Witness: Timber that you can log and get into the mill and make a little profit off from.

(Testimony of Fred Buss.)

The Court: Yes. Well, the objection is sustained.

Mr. Dezendorf: Could we ask for the answer to the question under the Court's ruling. We would like to make an offer.

The Court: You want to set out the definition of merchantability and ask him whether that timber is merchantable under that theory?

Mr. Dezendorf: Using the same one that we used at the outset.

The Court: Yes.

Mr. Hoffman: If the Court will indulge me, we will find [423] that.

Q. Now, Mr. Buss, I want to ask you this and listen, please. Will you please accept this definition I am going to read to you as the definition of merchantable timber in this case? Then you can give us your opinion. Merchantable timber is that timber on a particular date which I will mention which has a commercial value, taking into account its size, quality, its location, accessibility, demand and market conditions. Now, using that as your definition of merchantable timber, do you have an opinion as to whether or not this second-growth timber on the Seaver property on May, 1942, was merchantable?

Mr. Biggs: I object, if the Court please. He previously stated, your Honor, that that is not a proper test of——

The Court: I note your objection. Go ahead. Answer the question.

(Testimony of Fred Buss.)

Q. (By Mr. Hoffman): Do you have an opinion?
A. I have.

Q. What is your opinion?

A. Wasn't merchantable.

Q. Was not merchantable?

A. Not under them conditions.

Mr. Hoffman: That's all. You may [424] examine.

Cross-Examination

By Mr. Biggs:

Q. You say that second-growth on the Seaver tract was not merchantable under the definition that was given to you?
A. I did.

Q. Was that correct? If it were sold on that date, you would still say it was not merchantable; is that correct?
A. Yes; I'd have to.

Q. You would have to say it even though people who owned it sold it for money to people who bought it and paid the money? You'd still say that it wasn't merchantable, is that correct?

A. For that one strip of timber alone it wouldn't be merchantable. It would be impossible to get it out.

Q. Would it be with another tract?

A. Oh. If you had enough of it, it might.

Q. Yes. If you had several thousand acres of timberland up there adjoining it containing several million—maybe forty million feet in the immediate area, would it then be merchantable?

A. Well, may I make a statement.

(Testimony of Fred Buss.)

The Court: Yes. Go right ahead.

The Witness: That road over there was absolutely impossible to haul logs over and to build a road in there to haul logs over would cost into millions of dollars. That's [425] why I say it's not merchantable.

Q. (By Mr. Biggs): How many dollars?

A. I don't know. I didn't build the road.

Q. No. What did you say, millions of dollars, or many dollars?

A. It would cost a lot of money.

Q. A lot of money. You wouldn't know how much it cost and, of course, you wouldn't know how to allocate it against all the value of the timber, would you?

A. Well, I know there wasn't enough to build it. It wouldn't even build the road, let alone anything else.

Q. You are talking about one tract?

A. That one tract wouldn't, no.

Q. If you had millions of feet in that area, then, you are not prepared to say it wouldn't justify the construction of a road in the area, are you?

A. If you had enough other timber, it might.

Q. How much other timber would you need?

A. I don't know. I never built the road.

Q. You haven't any idea about that?

A. I don't know.

Q. You are not an expert in logging accounting, are you?

(Testimony of Fred Buss.)

A. Yes, I am in logging but not road building.

Q. But not road building. In any event, your thinking about it is that nothing is merchantable that is not profitable; is [426] that correct?

A. That's the way I would put it, yes.

Mr. Biggs: That's all.

Mr. Hoffman: That's all. Thank you very much. You may step down.

(Witness excused.)

Mr. Dezendorf: Call Mr. Jones. [427]

HERBERT R. JONES

previously produced as a witness in behalf of Plaintiff, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dezendorf:

Q. Mr. Jones, in connection with the joint cruise that you made of the Seaver property, did you examine the property with a view of determining whether the second-growth or other timber there was suitable for poles or piling? A. Yes.

Q. What can you tell us about that?

A. Well, that isn't the type of second-growth timber that's used for piling at all.

Q. Why not? What is the matter with it?

A. Well, it's not the long, slim, close-grained type of timber that used for piling. It just isn't piling, the same shape or form that piling is.

(Testimony of Herbert R. Jones.)

Q. Was this fast-growing second-growth?

A. Very fast.

Q. And what does that do with respect to the development of rings in it?

A. The rings are quite aways apart.

Q. Is that why it's not suitable for piling, among other things?

A. That's one of the reasons. [428]

Q. And did you find that there was any stand or stumps on the property which indicated that there was second-growth on there suitable for poles or pilings?

A. Well, there might have been a few.

Q. But it would be a relatively small amount?

A. That's right.

Q. Now, was the second-growth timber on this land comparable to the second-growth timber on the land that you bought in Coos Bay?

A. It was very similar.

Q. Were the ages about the same?

A. Pretty close. The timber I bought was probably a little bit younger.

Q. How old, generally, was the second-growth fir on the Seaver property in 1942?

A. Well, it was from 50 to 70 years old when it was logged in 1950, so it would be between 40 and 60 years old in 1940.

Q. That's relatively young second-growth, is it not? A. Yes.

Mr. Biggs: That's rather leading, if the Court please.

(Testimony of Herbert R. Jones.)

The Court: Well, that's all right. Go ahead.

Q. (By Mr. Dezendorf): Was it at that age comparable with what you had on your property at Coos Bay? A. Yes.

Q. Were you able to market your second-growth on your Coos [429] Bay property when you bought it? A. No; not for a year or two.

Q. When were you able to first sell it to a mill?

A. I think it was in 1949. Might have been late '48.

Q. Did you actively try to sell it before that time?

Mr. Biggs: If the Court please, this is wholly irrelevant, what one man's experience was in the operation.

The Court: In the Coos Bay area.

Mr. Biggs: And I object to any further questions.

The Court: Go ahead.

Q. (By Mr. Dezendorf): Before you were able to sell it? A. Yes.

Q. There was some testimony yesterday about some second-growth—I guess it's Hills Creek Lumber Company. Are you familiar with the second-growth stand that they were working in?

A. I am.

Q. What connection, if any, do you have with that operation?

A. Well, at the present time I do their engineering for them.

Q. Is the second-growth that was available to

(Testimony of Herbert R. Jones.)

them comparable to the second-growth that was on the Seaver property in 1942?

A. No, it isn't.

Q. What is the difference?

A. Well, there is a tremendous difference in the second-growth. [430]

Mr. Biggs: Just one moment, if the Court please. It's entirely a different and new line of expert testimony, when Counsel opened his case and has rested his case on the theory that second-growth timber was not merchantable timber per se in 1942. This is an attempt now, apparently, to show that some second-growth may be and some may not be. It is opening up entirely new standards as a part of their case in chief which will require us to come back on surrebuttal and meet what dimensional evidence or new standards they are asking the Court now to apply. It's a departure from——

The Court: I don't see why these questions were not propounded to this witness on your case in chief.

Mr. Dezendorf: Because Mr. Graham was called by them as a witness. We are trying to rebut their testimony. We can't anticipate they are going to call Mr. Graham. We are trying to now show what Mr. Graham was talking about isn't comparable to Seaver land.

The Court: He was talking about second-growth timber.

Mr. Biggs: You said all second-growth was non-merchantable in 19——

(Testimony of Herbert R. Jones.)

Mr. Dezendorf: I don't accept your statement of that.

Mr. Biggs: Well, then, what was it, Mr. Dezendorf? I have wanted to know from—all during pre-trial proceedings precisely what your position was with respect to the types or kind of second-growth that you said was not merchantable and [431] you have always said that none of the second-growth timber was merchantable.

Mr. Dezendorf: On the Seaver tract. I am not concerned about anything else.

Mr. Biggs: When you put Mr. Jones on in your case in chief it was to the effect that no second-growth timber was merchantable in 1942.

Mr. Dezendorf: I disagree with you. His inquiry was directed to the Seaver property and nothing else. We are merely trying to meet what their witness testified about.

Mr. Biggs: You didn't limit it to 40-, 60-year growth, Mr. Dezendorf.

Mr. Dezendorf: I don't see any point in arguing with him about it. Let's get a ruling.

The Court: Well, I might say that if Mr. Biggs was misled I certainly was, because that is what I thought your position was throughout this case. This is for the first time that I am advised that you make any distinction between second-growth on this tract and second-growth generally.

Mr. Dezendorf: Why, there is all kinds of second-growth, your Honor.

(Testimony of Herbert R. Jones.)

The Court: Well, why didn't you say so in your opening statement and your——

Mr. Dezendorf: I am sure that I have limited everything that I have said to the merchantability of the second-growth [432] timber on the Seaver property.

The Court: Well, you can bring in all the evidence you want and you can have a delay in order to meet this evidence. This is the only witness of this kind I am going to permit. Have you got any other witnesses?

Mr. Dezendorf: Just Mr. Seaver.

The Court: Mr. Seaver. All right.

Mr. Dezendorf: Which is to meet the point on the Swenson operation.

The Court: All right.

Mr. Dezendorf: Would you read the question, please?

(At this point Mr. Dezendorf's last question to the witness and the witness' answer thereto were read by the Court Reporter.)

Q. (By Mr. Dezendorf): Complete your answer.

A. Well, the second-growth that grows in the Coastal area is an entirely different type of second-growth timber that grows in this Eugene area. And the Hills Creek Lumber Company, they logged in the Hills Creek vicinity, which is very close to Eugene, which is not the type of second-growth that grows on the Seaver property. It's a closer

(Testimony of Herbert R. Jones.)

grain, slower growing, and it's much more valuable a type of timber than the Coast second-growth.

Q. As a matter of fact, the Hills Creek second-growth was even east of Eugene, was it not? [433]

A. Yes.

Mr. Husband: If the Court please, now, if I remember Mr. Graham's testimony—and I may have missed some of it—my recollection was that he was talking about the problem of second-growth in general. He was not talking about second-growth of the Hills Creek Lumber Company. And I don't remember any testimony in his testimony about second-growth that they were dealing in at that time or were operating in at that time in 1938 when he went there. He was talking about the whole problem of second-growth timber in this vicinity in Lane County. I remember he said there were three or four mills in Lane County that were operating exclusively on second-growth.

The Court: All right.

Mr. Dezendorf: You may cross-examine.

Cross-Examination

By Mr. Biggs:

Q. What are the specifications for piling that you say make second-growth suitable, Mr. Jones?

A. Well, it's very varied in diameter. There are small piling and long—what they call fish strap piling. There is a tremendous variation.

Q. What is the variation? Give us the outer—

(Testimony of Herbert R. Jones.)

A. The ring count is usually around seven rings to the inch. [434]

Q. Well, what does that mean in diameter? Could you transpose that in diameter?

A. Well, the diameter of that piling, the maximum usually was around 18 inches or 14 to 18 inches.

Q. The maximum. What is the minimum?

A. Well, I would say about 8 to 9 inches. They go by top diameters usually.

Q. What is the length?

A. From 20 feet to one hundred and—whatever you can get. 150.

Q. All right. What other specifications?

A. It has to be straight.

Q. All right. Anything else?

A. I can't think of any.

Q. All right. Do you mean now to tell the Court that there was no substantial amount of second-growth on the Seaver tract between 8 as a minimum and 18 as a maximum inches in diameter, over 20 feet high, that were straight? Are you telling the Court that?

A. I am saying that there wasn't any timber on the Seaver property that would be—make good piling.

Q. Well, I have asked you to define what the specifications are for piling and you have said just what I have quoted to you. Now, do you mean to say that there was no substantial amount of second-growth on the Seaver tract that would [435]

(Testimony of Herbert R. Jones.)

meet the specifications that you yourself have laid down?

A. Mostly on account of the ring count, not because it wasn't straight and wasn't 20 feet long.

Q. What does the ring count have to do with it?

A. That was just one of the specifications for piling.

Q. Yes. Tell us why it is important whether it has six or seven or nine or ten?

A. Because it has a much better lasting quality. When piling is driven in salt water and after it is creosoted it doesn't make any difference. But when it's uncreosoted piling, why, it makes a lot of difference when you get——

Q. Do they creosote most or not? Is there a market for uncreosoted piling?

A. Yes.

Q. I mean for creosoted piling?

A. There is a market for both.

Q. There is a market for both. So that it doesn't make any difference as to the ring count in 1942 if you treated it with creosote?

A. Well, in 1942 they weren't treating it so much with creosote as they are now.

Q. Were they doing it at all?

A. I don't know exactly. Of course they were doing some.

Q. Doing a lot of it up in Washington, weren't they?

A. Well, I wasn't up in Washington in 1942 so I don't know. [436]

(Testimony of Herbert R. Jones.)

Q. Well, you weren't around here either, really, in 1942, were you?

A. Yes; I was here until October, 1942.

Q. Until October, 1942? A. Yes.

Q. You were here ten months. And you had been here, then, only a year, I believe you said?

A. That's right.

Q. Yes. So, you really don't know what they were doing down in this area, do you? I say "area." I am talking about Lane County.

A. Yes, I know what they were doing.

Q. Well, weren't they selling any piling? Was there a market for piling? A. Well, sure.

Q. Produced in this area down here that would require creosoting, if you know? If you don't know, say so. A. I presume there was.

Q. There was. Well, then, wherein was the second-growth on the Seaver tract not merchantable or suitable for piling by your definition, Mr. Jones?

A. I don't quite get that. I don't quite get your question.

Q. You don't? A. No.

Q. I have attempted in complete fairness to you to take every [437] standard or specification that you have mentioned as a measure for determining the suitability of timber for piling. I thought you had given it to me. You gave me the dimension 8 to 18 inches. You gave me the height, 20 to 150 feet. You said that it was straight and you said that it should be not under a seven-ring count; is that correct? A. That's approximately correct.

(Testimony of Herbert R. Jones.)

Q. Which I assume means so many rings to the inch on a stump, is that right?

A. That's right.

Q. Now, you have just said that you didn't think most of that on the Seaver tract would meet the ring-count specifications; is that right?

A. That's right.

Q. But you said that wouldn't make any difference if you creosoted the log; is that correct?

A. It makes a difference, but it don't—

Q. Well—

Mr. Dezendorf: Let him finish. He has been interrupting his answers there.

Mr. Biggs: All right.

The Witness: It makes a tremendous difference, but since they have started to creosote—before—I should say before they started to creosote piling, why, they wouldn't touch a large—a piling that had three rings to the inch, for [438] instance.

Q. (By Mr. Biggs): But I thought you said they were creosoting in 1942?

A. I said I didn't know for sure, but I presumed they were.

Q. Oh. Well, that's what I thought you said. If they were, then, the creosoting would overcome the defect in the second-growth log so far as the ring count is concerned, is that correct?

A. Well, to a certain extent. It was a question of supply and demand. If there was a sufficient piling that had a close ring count, they wouldn't fool with piling that had three rings to the inch.

(Testimony of Herbert R. Jones.)

Q. As far as marketability is concerned, it's always a question of supply and demand, even on old-growth, isn't it? A. Yes.

Q. Yes. So that we are talking now about specifications, meaning the usability of a log for particular purposes. Do you mean with those definitions in mind and considering that the second-growth on the Seaver tract that was under seven rings to an inch could have been creosoted, do you mean to say that the second-growth on that tract wasn't within the specifications you have laid down for piling?

A. Yes, that's what I mean to say.

Q. Why?

A. That that wasn't the second—that wasn't piling type [439] timber.

Q. Well, then, tell me why. Wherein wasn't it within the specifications you have said?

A. Well, in the first place it wasn't straight, most of it.

Q. Wasn't straight? A. No.

Q. Well, how straight does a tree have to be?

A. You have to be able to drive it.

Q. Yes. You would say the second-growth on the Seaver tract wasn't straight enough to drive, couldn't produce poles straight enough to drive?

A. Well, I wouldn't say all of it couldn't.

Q. Well, how much of it?

Mr. Dezendorf: Just a minute. There he goes again interrupting every answer that this witness attempts to make on cross-examination. And I object.

(Testimony of Herbert R. Jones.)

The Court: All right. Go ahead.

Mr. Biggs: Finish your answer.

The Witness: It's just not the piling type. It tapered too fast and it was too—wasn't a straight tree. It had lots of limbs on it and it was more of a scrub-type tree than the type that's used for piling.

Q. (By Mr. Biggs): And how much of it was that way?

A. Well, I don't know exactly how much. All I saw was the stumps and the surrounding trees. [440]

Q. Well, then, how can you speak about what the trees were like if you saw only the stumps?

A. Well, I saw the surrounding—what we judge the timber to be on the Seaver place was by what was still left there, what was left on the surrounding areas.

Q. In other words, what was left on the surrounding areas didn't look to you like the kind of logs that you would like to have for pilings, but you didn't see and couldn't visualize from the stumps what the trees were like on the Seaver place, is that correct?

A. That's correct. We couldn't tell except from the ring count of the stumps and adjoining timber.

Q. Were there any other uses being made of second growth other than piling, planks?

A. Ties.

Q. Ties? A. Uh-huh.

Q. Yes. A. Yes.

Q. Bridge decking?

A. I suppose some bridge decking.

(Testimony of Herbert R. Jones.)

Q. Studding? A. Yes, studding.

Q. You don't mean to say the second-growth on the Seaver place wasn't suitable for those [441] things? A. I didn't say that.

Mr. Biggs: I didn't think you did. I wanted to be sure you didn't. That's all.

Mr. Dezendorf: That's all, Mr. Jones.

The Court: Let me ask you, was it suitable for these other purposes?

The Witness: Second-growth?

The Court: Yes; on the Seaver place.

The Witness: Yes.

The Court: So, the only point that you were bringing out, that it wasn't suitable for piling?

The Witness: That's right.

The Court: All right. That's all right. That's all.

Mr. Dezendorf: Now that the Court has asked that——

Redirect Examination

By Mr. Dezendorf:

Q. How would you have gotten the second-growth out of there in May of 1942, Mr. Jones, if you were going to try to use it for piling or ties?

The Court: You don't have to go into that. The same way they would take the old-growth out, by building a road. Okeh.

Mr. Dezendorf: Just a minute.

Q. Wasn't the ring count of ties important, too?

A. Very important. [442]

(Testimony of Herbert R. Jones.)

Q. Would all of the second-growth on the Seaver property meet the specifications for ties?

A. Well, it would meet the specifications for a certain kind of tie.

Q. Was it the low-grade or the high-grade or what? A. Low-grade tie.

Q. Low-grade? A. Yes.

Q. How many grades were there?

A. Well, I am not an expert on ties, but I understood there was about three grades.

Mr. Dezendorf: That's all.

Mr. Biggs: That's all.

The Court: That's all.

(Witness excused.)

Mr. Dezendorf: We would like to then call Mr. Fox for the purpose of——

The Court: All right. Mr. Fox, will you take the stand, please? [443]

PERRY GRANT FOX

produced as a witness in behalf of the Plaintiff, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Dezendorf:

Q. Mr. Fox, what were your duties for Siuslaw during the time the logging was progressing on the Seaver property from '49 through '55?

A. Well, I was there to—primarily as an engineer—logging engineer.

(Testimony of Perry Grant Fox.)

Q. So that up until sometime in 1954 you didn't have any direct supervision or control over the logging activities on the Seaver property, is that correct?

A. Well, when you are talking about logging activities what do you include?

Q. Severing trees.

A. Yeah. I didn't have anything to do with that, no.

Q. All right. Now, I understand from Mr. McPherson that you became the logging superintendent sometime in 1954; is that correct?

A. Yes; I would say that is right.

Q. Did you continue on as the logging superintendent from sometime '54 until all of the activity stopped on the Seaver property?

A. Yes. [444]

Q. And during the period that you were logging superintendent from sometime in '54 until the end of 1950 were you familiar with what was going on on the Seaver property with regard to the severance of trees?

A. I was familiar, yes.

Q. I don't believe you filed any of the timber removal affidavits, did you?

A. I would have to check. I am sure I didn't, though.

Q. You are sure you did?

A. I did not.

Q. Did you procure any of the forest harvesting permits for the operations on the Seaver property?

A. Well, that would—I would probably have to look at the applications.

(Testimony of Perry Grant Fox.)

Mr. Dezendorf: Mr. Biggs, may I see that folder that I haven't had a chance yet to look at?

Mr. Biggs: Yes.

Mr. Dezendorf: Do you wish to have these marked as sub-numbers, Mr. Biggs. This is from 76. Will you mark that -A, then, please?

(At this point a permit was marked for Identification as Plaintiff's Exhibit 76-A.)

Q. (By Mr. Dezendorf): Showing you Exhibit 76-A, did you have anything to do with the procuring of that permit? [445] A. Yes, I——

Q. Or is that the application for the permit? What is it? That's the permit, isn't it?

A. This is the permit itself.

Q. Yes. That refers to certain cut-over land that you got a permit to cut on again in the Seaver tract, does it not, in 1954?

A. It's land on the Seaver tract.

Mr. Biggs: I think it speaks for itself.

Q. (By Mr. Dezendorf): Doesn't it say "cut-over land" there in the box?

A. No; I don't see any.

Q. Do you see a little black box in the middle of the page? A. Oh, yes.

Q. What does it say in there?

A. It says "Siuslaw cut-over strips or blocks."

Q. Did you have something to do with applying for that permit? A. Yes, I applied for it.

Q. And I assume that you applied for the other permits, then, during the time that you were the logging superintendent, is that correct?

(Testimony of Perry Grant Fox.)

A. I would say, yes.

Q. And you knew what was being taken from the property? A. Yes. [446]

Q. It was treated just as if you owned the property in fee, was it not, when it was logged?

A. Yes.

Q. Had you seen the May 4, 1942, contract among the records of the company at your office?

A. Yes, I have.

Q. And, as a matter of fact, this large map which, I believe, is Exhibit 20.

The Clerk: Two of them, -A and -B.

Q. (By Mr. Dezendorf): 20-A and -B were on the wall in the Manager's office in the Siuslaw office at Mapleton, were they not?

A. No; they wasn't in the Manager's office.

Q. Where were they?

A. They were in the office that I used.

Q. What office was that, the logging superintendent's office?

A. Well, it was my office. I don't know whether they call it the logging superintendent's office or Fox's office, or whose it is.

Q. It was the office that you occupied?

A. That's right.

Q. On those maps are shown the estimated quantities of timber which appear on the timber estimate and depletion records that we have talked about, too, isn't that correct?

A. I would say, yes. [447]

Q. Now, just to take you very quickly over the point that I am interested in that you testified in

(Testimony of Perry Grant Fox.)

your deposition—I think we can do it quicker this way.

The Court: Well, do it the correct way. Just ask him the questions. If he doesn't give you the answers that you like, you impeach him.

Mr. Dezendorf: Very well. Or, may I not do it as admissions, also, your Honor?

The Court: Well, see what he says first.

Q. (By Mr. Dezendorf): As I understand it, Mr. Fox, the bulk of the timber was taken off the Seaver property in the year 1950.

A. I don't know—I don't get what you mean when you say "bulk."

Q. All right. Page 27.

A. I would say the large majority was—of it was taken off.

Q. You mean the largest portion of the timber was taken in 1950, is that right?

Mr. Biggs: If the Court please, we have stipulated, Mr. Dezendorf and I, as to the volumes. And the purpose of it was to arrive at some figure that would not leave the Court or the record in confusion as to what different witnesses might have estimated. That is a matter of record. I see no relevancy to this. [448]

The Court: All right. It doesn't make any difference.

Q. (By Mr. Dezendorf): Now, I understand that there was a tremendous increase in the price of stumpage from 1948 on; is that correct?

A. On until the present time.

(Testimony of Perry Grant Fox.)

Q. Well, let's say from '48 to '54.

A. Well, there is an increase, yes.

Q. Well, there was a very heavy increase, was there not?

Mr. Biggs: If the Court please, I don't like to keep interrupting. We have stipulated to values also by years.

The Court: That doesn't make any difference.

Mr. Biggs: At Counsel's request.

Q. (By Mr. Dezendorf): Mr. Fox, did you make these answers to these questions on your deposition? Page 35.

Should the original be before him, or may I interrogate from my copy?

The Court: Go ahead and read.

Q. (By Mr. Dezendorf): Line 15:

"Q. Well, from your own experience and background can you state whether or not the value of that stumpage has increased from 1948 up to the present time?

"A. Yes, it has increased in price considerably. That's for sure."

Did you make that statement? [449]

A. Yes, I did.

Q. Was it true? A. Yes.

The Court: That's not the question you originally asked him to impeach. You said there was a tremendous increase of that before.

Mr. Dezendorf: Well, he said, "It has increased in price considerably. That's for sure."

The Court: Yes.

(Testimony of Perry Grant Fox.)

Mr. Biggs: Your Honor, my objection is this: I think it's improper to call a witness solely for the purpose of impeaching him.

Mr. Dezendorf: I am not——

Mr. Biggs: Now, substantive matters, everything you have talked about, were covered by stipulation and were put into the record to avoid any question about these issues. The rest of it is solely for the purpose of impeaching and it's improper.

The Court: Well, I think he has a right to get this information——

Mr. Biggs: Information——

The Court: ——from him, and then if he is caught by surprise he may use the deposition.

Mr. Biggs: Yes; except we have stipulated as to volumes and values, and that's all he has talked about.

The Court: Go ahead. [450]

Q. (By Mr. Dezendorf): Now, was there a record kept of the log recovery by tracts as the Seaver property was logged?

A. I think I said in my deposition that I thought that the office manager kept a book of what logs came in from each tract as our description of the tracts go.

Q. Is that the fact?

A. I don't know. I wasn't able to find out whether he did or not.

Q. Did you try?

A. I called him, yes.

Q. So far as you know, then, as of this moment

(Testimony of Perry Grant Fox.)

you don't know of any record that would show the volume of timber taken from the Seaver property by tracts as it was logged? A. That's right.

Q. Were there any little maps kept annually to show the quantity of timber removed from each piece of property that you cut?

A. Well, of course, our depletion records were kept.

Q. I am not talking about depletion records; I am talking about maps. A. No.

Q. At the time your deposition was taken you thought there were?

A. At the time my deposition was taken I said that there was maps that we used in our depletion records and I am not [451] sure whether you are talking about at the time that we were on the Seaver property or what I was doing now.

Q. May I refer you to Page 105 of your deposition, commencing at Line 12? I will ask you if this question was asked you and if you gave these answers:

“Q. Now, in connection with your accounting, whether it's at the end of the year or not, do you furnish certain maps showing timber areas and timber cut and that sort of thing?

“A. At the end of the year, sure, we show what has been cut.

“Q. On a map? A. On a map.

“Q. What kind of a map do you use?

“A. Well, it varies. Anything to make a pic-

(Testimony of Perry Grant Fox.)

ture, you might say, or show where the cutting is.”
Did you give that testimony?

A. Yes. And that was after this—that was after the depletion records was kept. That’s exactly the way that I did that after I was in charge of the records.

Q. At the time you gave your testimony you thought that was the case also during the time the Seaver property was cut, did you not?

A. Well, I think I didn’t know at that time because I——

Q. All right. Now, you referred to a possible sale of the [452] timber to Cascade Plywood Company in 1954. A. Yes.

Q. Who with Cascade Plywood Company were you dealing on your level?

A. Well, I wasn’t dealing with anybody.

Q. Well, did they come down there and look at your timber depletion records?

A. Well, yes. There was——

Q. All right. Who came down? That’s what I’m trying to find out.

A. I think probably Mr. Robert Conklin was the first man that came in.

Q. Was there someone else there with him?

A. Well, there is men there from time to time. I don’t know——

Q. And that was in 1954, was it not?

A. Yes.

Q. Isn’t it a fact that you told Mr. Conklin that

(Testimony of Perry Grant Fox.)

all of the timber had been removed from the Seaver tract by the spring of 1954?

A. I didn't tell Mr. Conklin anything.

Q. Did you give him records that showed that it had all been removed before 1954?

A. I couldn't say whether I did or whether I didn't. I don't know. [453]

Q. Well, did you talk to him? Were you the man that dealt with him?

A. No; I didn't deal with him; I told you that.

Q. Who did?

A. I told you I didn't make any dealings.

Q. Well, who was the one that Mr. Conklin was talking to? A. I do not know.

Q. You were there, but you don't know?

A. It wasn't under my—I didn't have authority to make any deals.

Q. You tell us that you haven't any idea who Mr. Conklin was talking to at your office in Mapleton, is that right?

A. Well, a man would naturally assume he would be talking to the Manager.

Q. Who was the Manager in 1954?

A. Ralph DeMoisee.

Q. When did Mr. DeMoisee come?

A. Well, I'd say he was there in '54.

Q. Yes. But he came later in the year '54, didn't he, and this transaction was in the spring of '54, wasn't it?

A. Oh, I don't know when the—I would have to think. That's been awhile. Since you mention it, I

(Testimony of Perry Grant Fox.)

think that Frank McPherson was the Manager when Mr. Conklin came in.

Q. Do you think they were the two that were talking about what timber there was to be sold, if any? [454]

A. Well, I don't know whether that would be so or not. But you would have to talk to them about that.

Mr. Dezendorf: That's all.

Mr. Biggs: That's all.

The Court: That's all. Call your next witness.

The Witness: What shall I do with this?

Mr. Dezendorf: That goes in here (indicating). Thank you. Call Mr. Seaver.

Mr. Biggs: May I ask him one question on the permit?

Cross-Examination

By Mr. Biggs:

Q. Does that include more than the Seaver tract? A. Yes. Others.

Q. Other areas? A. Yes.

Mr. Dezendorf: I think it will speak for itself.

The Court: Are you offering it?

Mr. Dezendorf: That's the exhibit that we still haven't had a chance to look at.

The Court: You don't want to offer it?

Mr. Dezendorf: No. We still haven't had an opportunity, your Honor. You have kept us so busy. And the exhibits are here when we are gone so we haven't had a chance to look at those to compare. [455]

JOHN N. SEAVER, JR.

produced as a witness in behalf of the Plaintiff, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dezendorf:

Q. Mr. Seaver, were you in the courtroom yesterday when a witness was telling about the Swenson mill, I believe it is? Is that the correct word?

A. Yes; it was mentioned yesterday.

Q. Where is the Swenson mill and where was it in the period from 1942 on?

A. In 1942 it was at Swisshome, is where his mill was there.

Q. It's always been there?

A. Well, the one in that area, yes.

Q. Right. Do you know of your own knowledge what kind of logs that Swenson mill was cutting in the period 1942 and immediately thereafter?

A. I don't know. After that I went in the Service.

Q. All right. But I am just trying to gear you now to '42 to '45. Do you know what kind of logs that mill was cutting in that period?

Mr. Biggs: He said he didn't—

The Witness: I could say from '42.

Mr. Dezendorf: All right.

Q. Tell me for '42. [456]

A. Mainly old-growth timber.

Q. Now, did you or your family purchase any

(Testimony of John N. Seaver, Jr.)

cut-over land which had been logged by the Swensen Company on or prior to 1942?

A. Just about that time, about 1942, we bought property from them.

Q. How much did you buy?

A. I think, one piece, 160 acres adjoining property already owned.

Q. Was that in the vicinity of the Swensen mill at Sweet Home? A. Swisshome.

Q. Swisshome?

A. Within a mile; yes, sir.

Q. Was it right on a road? A. Yes.

Q. What timber remained on that property at the time you bought it in 1942?

A. Well, by stand? Now, there was lots of timber.

Q. Was it old-growth or second-growth that was there when you bought it in 1942?

A. Mainly second-growth. But there was still a lot of old-growth.

Q. Had any appreciable quantity of the second-growth been logged from the land prior to the time you bought it in 1942 [457] by the Swensens?

A. No.

Mr. Dezendorf: You may cross-examine.

Mr. Biggs: No cross-examination. Just a minute.

Mr. Dezendorf: One question. I wonder whether the Court would like some explanation of those pictures. They are here and they have been received. Mr. Seaver is the only one that we know that can give a little short description of each picture. If

(Testimony of John N. Seaver, Jr.)

you think that would be helpful—I think it would be for the record.

The Court: Let me take a look at the pictures.

Mr. Dezendorf: It's pretty hard to tell where they were taken from unless there is a little explanation that goes with them. I think it might be wise to have him briefly do that.

The Court: There is no legend on them?

Mr. Dezendorf: No, there is not. But he can just give a one-sentence description with respect to each one.

The Court: All right. Go ahead.

Mr. Dezendorf: May I hand them to him one by one?

The Court: Yes.

Mr. Dezendorf: I'll see if they're in order.

The Court: Yes.

Q. (By Mr. Dezendorf): Mr. Seaver, I am handing you what has been marked as 12-A. Will you tell us briefly what that picture shows and whether it was on your land? We will get a [458] little better as we go along. But try to be as brief as you can.

A. Well, this looks like my land, yes. There is not much in this picture to orient me as to exactly where it was.

Q. You were there when these pictures were taken?

The Court: What is it supposed to show?

The Witness: The land as it looks right now.

(Testimony of John N. Seaver, Jr.)

The Court: Oh. That's what it is?

The Witness: Last month.

The Court: All right.

Q. (By Mr. Dezendorf): Now, showing you 12-B, what does that show?

A. Well, I am in this picture. I was standing on some old-growth stumps. And it looks like I might be a couple hundred feet off the gravel road. The car is shown there, too.

Q. What is the point of the picture?

A. I am way up here. Well, it shows I am up inside the timber that's standing there and the timber is cut up in there. And there is timber between me and the road that wasn't cut.

Q. Handing you -C, what is the purpose of that picture? What does it show?

A. Oh, I am measuring a typical stump along—right close to the road there. I don't think we picked out anything particular.

Q. What was the measurement of the stump?

A. Well, I can't read my tape in the picture, but it looks [459] like about 18 inches.

Q. All right. Showing you 12-D, what does it purport to show?

A. This is a picture that was taken prior to the first one where I was a small spot in the picture. I was over on the edge of this hill over here (indicating).

Q. The hill in the center? You had better say where or it won't mean anything.

(Testimony of John N. Seaver, Jr.)

A. The one in the center just down the road a little bit.

Q. Showing you 12-E, what does it show?

A. This is a side canyon off of the main road. It's a picture taken right up through the bottom of the canyon. It shows the hills on each side and it shows the cut-over ground.

Q. Is the property where the trees are still standing your property?

A. Yes. I think everything in that picture is still my property. I am sure it is.

Q. So, it shows what was cut and what was left, is that right? A. Yes.

Q. Showing you now 12-F, what does it show? Tell us whether the timber that appears in the immediate foreground is on your land or on adjoining land, or what?

A. The picture is taken from my land looking northeast to adjoining land. This is a timber stand right against my [460] property as it is right now.

Q. But the timber that is shown there is not your land but on land owned by Siuslaw or U. S. Plywood?

A. That's Forest Service property, that particular piece.

Q. I see. Was the timber on your property typical of that before it was logged? A. Yes.

Q. Showing you now 12-G, what does it show?

A. It's another typical hillside, taking a picture of the bottom ground and looking up the hillside. It

(Testimony of John N. Seaver, Jr.)

shows what is still standing, I guess, and what has been cut there.

Q. Showing you 12-H, what is the purpose of that picture?

A. This is about a half a mile farther up the road.

Q. Which direction, now?

A. This road (indicating) is going southwest that we are on here. I am about—the road isn't shown, but I recognize the picture of it. It's about 50 feet off the road again and just measuring a stump. Looks like it's about a 12-inch stump. And it shows the——

Q. Now, 12-I, where were you on the property and what does that show?

A. I am about 500 feet from the previous picture.

Q. In which direction?

A. Going north—or southwest, I believe. Generally southwest, and the road bank is shown here. And this shows timber [461] that is standing there. This is the edge of the road bank right here (indicating).

Q. Now, showing you, I guess it is, -J, where is that and what are those trees? Tell us what it shows.

A. This is taken at a different angle. Same picture as that one (indicating) but only back this way. This picture is taken here looking back this way (indicating).

(Testimony of John N. Seaver, Jr.)

Q. What are the size of those trees still standing at the side of the road?

A. I think that one there was 20 inches or two feet.

Q. Are those second-growth fir?

A. I call them second-growth.

Q. Now, I am showing you a more or less panoramic picture, 12-K, and will you tell us the position from which this was taken and whether the standing block of trees in the center are on your land?

A. This picture was taken prior to the last two we looked at—or before those last two. It was taken first in sequence going up this road (indicating). This is definitely on my land. We are looking southwest.

Q. Is that stand of timber in the middle on your land?

A. Yes. This is the same road only—

Q. All the timber that appears in the picture is on your land?

A. No. In the background are Forest Service timber. [462]

Q. The foreground, however, is yours?

A. Yes.

Q. Showing you now 12-L, what does that show?

A. Well, this shows one of my fields, typical bottom of the valley looking up the hillside. It shows the hill and the cut area and whatever remains on it.

Q. All right. Showing you, now, 12-M, what does that show and where was it taken from?

(Testimony of John N. Seaver, Jr.)

A. Well, right out in front—this is taken pretty close to the main road and right out in front it shows some large stumps and it shows a lot of small standing timber in the back here (indicating).

Q. Everything that appears there is on your land?

A. I can't say positive. I don't tie it to a landmark right here in this particular picture. But I know these pictures were taken on my land.

Q. All right. Looking at 12-N, what does it show?

A. Well, this shows part of my property and part of U. S. Plywood's property. This is where our two properties join in the northeast corner.

Q. Which side of the picture is your property and which side of the picture shows U. S. Plywood's timber?

A. The left-hand side is mine, and the right-hand side is U. S. Plywood's.

Q. Now, that's as you look at the picture, is that correct? [463]

A. Yes. You are looking west in the picture.

Q. However, if you looked at the picture itself to the top it would reverse the directions, would it not?

A. Looking down from the top?

Q. In other words, let me have that and I will show you my point. I have my hand now on the right-hand side of the picture. Is that U. S. Plywood or your timber?

A. That's my property there.

Q. I have my hand now on the left-hand side of the picture. Which timber does it show?

(Testimony of John N. Seaver, Jr.)

A. That's U. S. Plywood's property over there.

Q. I am showing you now Exhibit 12-O. What does that show?

A. Well, it shows a typical old-growth stump right alongside the road right in the bottom.

Q. Can you tell the size of that from the ruler that's on top of it?

A. Well, just—this yardstick was too short to measure it.

Q. It's more than three-foot across at the place of the cut; right?

A. Considerably more than three-foot. It looks like——

Mr. Dezendorf: All right. You may cross-examine.

Cross-Examination

By Mr. Biggs:

Q. Well, the purpose of these pictures is to show you left [464] too much timber out there, Mr. Seaver?

Mr. Dezendorf: Well, I think——

Q. (By Mr. Biggs): Is that your contention, that this timber should have been taken or shouldn't have been taken?

Mr. Dezendorf: Just a moment. I would object to the question unless we get one question. We have got three now, and I don't know which one the witness——

Mr. Biggs: I want to know what the purpose of the pictures is.

(Testimony of John N. Seaver, Jr.)

Mr. Dezendorf: I think that's argumentative.

Mr. Biggs: I don't know what they purport to show.

The Witness: They show my property.

Q. (By Mr. Biggs): Show your property? Do you contend that the trees that were left there should have been removed?

A. I think my attorney——

Q. You don't know?

A. ——briefed me on the facts of what the law should be in regard to the thing. I don't know.

Q. You don't know. Well, is it your contention that it wasn't well logged? I am just trying to get the purpose of the pictures.

A. I don't know what he wants here.

Q. Are they in for any other purpose?

Mr. Dezendorf: They are to show what the property looked like a month ago. [465]

Mr. Biggs: So I don't care anything about that, then.

The Court: All right. Any questions?

Mr. Biggs: No questions.

The Court: That's all.

Mr. Dezendorf: That's all. As far as we know, we have nothing more; although it's about five minutes to 12.00. I wonder if we could adjourn and try to work out this stipulation as soon as the Reporter can transcribe it?

The Court: What about all these witnesses? Are they all excused with the exception of Mr. Sanders?

(At this point the following stipulation was read into the record out of the Judge's presence:)

STIPULATION

Mr. Dezendorf: It is stipulated between the parties for the purposes of this action that between January 1, 1953, and December 30th, 1955, excluding any timber removed from the property by the plaintiff, Seaver, the following quantities were removed: Old-growth, 850,000; second-growth, 3,100—3,125,000; hemlock, 431,000; cedar, 8,000, for a total of 4,414,000 board feet. The defendant by so stipulating does not waive its contention and its testimony that logging activity occurred upon the Seaver property in 1951 and 1952. By the same token, the plaintiff does not waive its contention or testimony that there was no logging on the Seaver property after logging operations ceased in 1950 until 1953.

Does that do it?

Mr. Biggs: I think that's all right. [469]

Afternoon Session

(Court reconvened at 1:15 p.m., on May 16, 1958, pursuant to the noon recess, and further proceedings were had herein as follows:)

Mr. Dezendorf: With respect to Defendant's 76, I plotted out the descriptions and find that the ones numbered 4278 and 6447 do not relate to the Seaver property. The rest of them do in part relate to the Seaver property. I will have no objection to all of

76 going in. I claim nothing for the little marks I made on them. They were just for my reference in checking through them.

The Court: Any objection?

Mr. Biggs: No; no objection, your Honor.

The Court: Admitted.

(At this point Defendant's Exhibit 76, a Manila folder containing eight documents entitled "Forest Operation and Conservation Harvesting Permit," was received in evidence.)

Mr. Biggs: We would offer, if the Court please, our Exhibit 65, which consists of checks that were written to John Seaver with letters.

The Court: Is that the one that Mr. Dezendorf wanted the stubs on? [470]

Mr. Biggs: Yes.

The Court: Have you seen the stubs?

Mr. Dezendorf: They haven't produced them yet.

Mr. Biggs: I am sorry. I overlooked it. They are coming up from the office now.

The Court: I will take it under advisement.

Mr. Dezendorf: We can work that out later. There will be no problem on it.

Mr. Biggs: Now, the only thing of any consequence, your Honor, are the field notes and maps, and so on. The field notes of the cruiser relating to comparable areas which they looked over prepared in the event there were any issue as to dimensional sizes. None has been created, so I think we won't offer those.

large chart which we haven't made [473] reference to. And I think if there is a little explanation to it it may mean more. This chart was made from an aerial survey dated July 8th and 9th, 1953. Mr. Hoffman, you on our side can point out the piles of logs there are there.

Mr. Hoffman: Mr. Seaver can. The Seaver property is outlined in magenta. Mr. Seaver, would you step to the map?

Should they be marked?

The Court: Oh, I don't think so. I don't think so.

Mr. Hoffman: They are hard to locate.

Mr. Seaver: Do you want these marked or just pointed to?

Mr. Hoffman: I might explain. The map and the aerial photo are made by the same company and they are exactly correlated as to size.

Mr. Biggs: I have no objection to the map going in. If there were some particular features you wanted to point out, perhaps we could stipulate to them. We admit there was cold-decking—logging in 1952 where the logs were cold-decked. So there probably were some piles of logs.

(At this point a discussion was held off the record.)

Mr. Biggs: What point is it you want to make, Mr. Dezendorf?

Mr. Dezendorf: I just wanted him to point out the cold-decked logs there. [474]

Mr. Biggs: He says he is able to do it.

Mr. Dezendorf: It won't mean anything to the record.

(Discussion held off record.)

Mr. Dezendorf: May I ask, Mr. Seaver, could you point out on the map the first cold deck that you see of logs?

The Witness: We just as well start on the road. Well, I thought they wanted to see it?

The Court: Why don't you just mark the cold decks with a red pencil? Have you got a red pencil? How about a green pencil here?

Mr. Hoffman: I have a red pencil, your Honor.

Mr. Dezendorf: You don't need to testify. Just mark them with a red pencil, the cold decks. You are making a red circle?

The Witness: Circle around these. I may miss some of them. I am trying to look at them in a hurry here.

The Court: I don't think that's going to make a great deal of difference. I think it might be helpful if we would take about an hour out and maybe Mr. Dezendorf would now tell us in a half-hour what he claims the evidence shows in support of the contentions that he has made.

Mr. Dezendorf: I would be pleased to.

The Court: Go ahead.

The Witness: I believe I have circled most of them.

(At this point Mr. Dezendorf [475] presented his argument to the Court.)

COURT'S OPINION

The Court: I don't think there will be any useful purpose served in my hearing additional arguments. I will first take up the question of abandonment.

I have read Heppner vs. Hughes at least a half-dozen times, and, according to the Court's opinion, in 1939 the defendant's predecessor deeded land reserving all pine and merchantable timber, together with the right to log the same at its convenience. Beginning in 1939 the defendant commenced to log, and as each section was logged, in order to remove the timber from the tax rolls and relieve the company of its obligation to pay taxes, a number of timber removal affidavits were filed with the Assessor.

Four of these affidavits were filed by Mr. Mahoney who was the attorney for the company and also a Director and a Secretary of the company, and one by the General Manager and Vice-President, who testified that he was through the property a number of times between 1939 and 1951. And one was filed by the forester of the company. This last affidavit was executed after "the defendant had admittedly examined the property."

Now, the Court stated, "At the conclusion of the logging operations in 1948, defendant pulled up stakes and, like the Arabs, folded its tents and silently stole away. Shortly thereafter plaintiffs fenced most of the lands and [476] installed a gate which was kept padlocked."

Various officers of the defendant admitted to other people, including interested buyers, that there were no logs on the Hughes' tract and that they had logged it all. The defendant did not claim any timber from the time it left the premises in 1948 until 1951.

That case is in sharp conflict with the facts of the present case. Here the affidavits were filed by Mr. McPherson, an agent who is neither an officer nor a Director. It is true that he had managerial functions and position, but, unlike Mr. Mahoney and the General Manager, he was neither an officer nor a Director. And he testified that he did not examine the tracts but made the affidavits solely from the cutting records.

I was impressed with Mr. McPherson's testimony. I think that he testified frankly, admitting things which were damaging to him without any hesitancy at all. I thought he was a particularly good witness.

The evidence also showed that in spite of these affidavits that the defendant continued to pay taxes on the entire tract after the affidavits had been executed; perhaps, not on the entire tract but on their allocable share of the taxes and they had paid taxes even after the cutting affidavits had been filed.

This is considerably different than in [477] *Heppner vs. Hughes*. Here, logging continued on the Seaver tract after 1950 with the knowledge of the plaintiff. Plaintiff acknowledged in a written contract the ownership of the stumpage in the de-

fendant. And it was the plaintiff who actually logged a part of that timber.

Even if I were of the opinion that the defendants in this case followed a practice which is all too common among timber owners in Oregon, I am still of the opinion that the other evidence in the case which clearly shows no abandonment would prevent me from finding abandonment solely on the basis of the affidavits.

I want to make it clear that I don't condone the filing of false affidavits any more than the Supreme Court of Oregon. But apparently everybody in the State except the Supreme Court of Oregon knows that these affidavits are being filed by various lumber operators. But I do not read *Hughes vs. Heppner* to require a finding of abandonment, even where a false affidavit has been filed in the face of clear and convincing evidence to the contrary. And, therefore, I am going to hold that in this case there was no abandonment in 1950.

Let us now consider the contract between the parties. Even if the decisions to the effect that a grant of merchantable timber is a grant only of the merchantable timber on the land as of the date of the contract, in my opinion [478] plaintiff is not entitled to prevail. In my view plaintiff proposes to place a strained, untenable and unrealistic construction on the terms "all of the merchantable old-growth and second-growth fir and hemlock," whether that portion of the sentence and those terms are considered alone or whether they are considered with the balance of the sentence, which

reads "either standing or down and now growing or located" on the property.

In other words, plaintiff's contention that in the year 1952 in the Mapleton area no second-growth merchantable timber existed flies in the face of the evidence and is contrary to the express intent of the parties as evidenced by the agreement itself. This is true even assuming his present statement that while there may have been merchantable timber on other tracts, particularly on the Coast, no such timber existed in this particular area.

If no second-growth timber is merchantable, why in the world would the parties have inserted a statement in the contract that they were selling second-growth timber? This is not a case of two people who didn't know the business. On one side we had Mr. Davidson representing the company, and on the other side Mr. Warlick. I don't think that either of them, particularly Mr. Davidson, would have put in a useless phrase "merchantable second-growth" if there wasn't any merchantable second-growth. [479]

The mere fact that in one year, or even in several years, second-growth could not be converted into timber profitably does not render the timber unmerchantable. If that were the case, during a depression one would have to hold that the best stands of old-growth timber which were on excellent terrain, either right next to a mill or on the road, were unmerchantable because the timber could not be sold at a profit.

This concept is not confined only to the lumber business. Both you men who represent railroads know that that is a very common thing. Lines are operated year after year at a loss because a greater loss would be suffered if the operations were discontinued. And many mills operate at no profit or little profit or at a loss in order to keep their facilities going. It is something more than making interest; it is keeping your organization together.

In addition, I believe that when the words "the grant" are construed in the light of the standard laid down in the case of *Parsons vs. Boggie*, 139 Ore. 469, and as approved in *Hughes vs. Heppner*, it is obvious that there was merchantable timber in 1942 as well as at all times thereafter. That portion of the opinion was quoted in *Hughes vs. Heppner* on Page 15, and it says, "The Court must, as far as possible, construe the instrument from the words used as showing what the parties had in mind at the time of its execution. The respondent sold and the appellant bought with [480] the understanding that the timber was to be removed. We must also take into consideration the circumstances surrounding the parties at the time the sale was made," and the following statement is underlined, "also, their attitude toward the subject matter subsequent to the execution of the contract." Mr. Warlick and Mr. Davidson are not in disagreement as to what was intended; neither is Mr. Gonyea, the three people who were witnesses to that transaction. According to Mr. Warlick, he told the Tucker brothers that he had sold all the timber. And, while

we don't have the benefit of the testimony of Mr. Tucker or either of the Tuckers, we have the testimony of the plaintiff himself that the Tuckers told him that they had sold all the timber and that he was only getting the land.

The plaintiff never claimed that second-growth was not merchantable until November, 1956. And that was about six months after he had filed this particular lawsuit. And, while the complaint is merely a notice pleading, I have read plaintiff's deposition, and if I know anything about Manley Strayer, the questions would have been much more precise had this claim been made. But it is obvious that plaintiff was claiming that the five-year period was the thing upon which he was hanging his hat; in other words, once the company entered the tract for the purpose of removing timber, it had only five years to remove the timber. [481]

Mention has been made of the fact of the \$7,000 price paid by the Siuslaw Forest Products Company originally. According to the Revenue Stamps, the plaintiff in this case bought this tract of land for very little money; I think it was \$4,000 or \$6,000.

Mr. Biggs: He said between three and four, or thirty-seven fifty.

The Court: And if plaintiff was to obtain any money or damages by reason of acts prior to the time he acquired it, plaintiff got such claim for free. He didn't pay anything for it.

But I don't think you can decide lawsuits on that basis. Timber was selling for a lot less then.

I imagine that Weyerhaeuser Timber Company today is cutting timber that cost it 25 cents a thousand. And I believe many other companies are doing the same thing.

Whether we construe the contract by its wording alone or whether we construe it in the light of the position of the parties, I can't see that any interpretation is valid other than that the buyer was to get all of the timber.

I was very much surprised at Mr. Gonyea's testimony that there was a discussion about the cedar. Maybe there was, but there was quite a bit of disagreement as to what happened about the cedar. I don't think that we can attribute malice and evil intent to the company for cutting down five cedar [482] trees in a tract of 400 acres. But, in view of the fact that it was admitted at the commencement of this case that defendant is liable for the cedar, it wasn't much of an admission, for it only involved \$40—I find that the company is liable for this cedar. I am going to allow a judgment against them for that amount doubled. I am not going to allow treble damages even though it's a very trivial amount, because I don't think that there was any wilfulness in the action of the company.

Now, is there anything else that you want me to cover, either of you, or make findings on? I am willing to make findings on anything, either for or against you.

Mr. Biggs: It's very clear, so far as we are concerned. You cover the points quite well.

The Court: All right. Well, you present findings——

Mr. Biggs: Very well.

The Court: ——to the plaintiff and I will give you ten days within which to—well, I won't enter the findings for a period of ten days after they have been presented to me and after they have been served upon Counsel. I think all the exhibits have been admitted into evidence. Those that have not been admitted may be made a part of the record if either party desires so the Court of Appeals will have the opportunity to right a wrong if a wrong has been committed.

Mr. Dezendorf: All of ours have been [483] identified.

Mr. Biggs: Ours have all been identified, your Honor, and we are not going to make any further presentation of exhibits. We think that covers the point.

The Court: All right. We will adjourn this court. This court will be recessed sine die.

(At this point the Court adjourned and proceedings in this matter were con- [484] cluded.)

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Jack Ellis, an Official Reporter of the above-entitled Court, do hereby certify that I reported

in stenotype at Eugene, Oregon, on May 14th, 15th and 16th, 1958, the proceedings had in the above-entitled matter; that I thereafter caused my said stenotype notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of Pages numbered 1 to 484, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so reported by me in stenotype on said dates, as aforesaid, and of the whole thereof.

Dated at Portland, Oregon, this 26th day of December, 1958.

/s/ JACK ELLIS,
Official Reporter.

[Endorsed]: Filed January 2, 1959.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Petition for removal; Answer; Amended complaint; Answer to amended complaint; Pretrial order; Findings of fact and conclusions of law tendered by defend-

ant (not filed); Letter dated June 17, 1958, with attached pages 9, 12 and 13 of tendered findings of fact and conclusions of law; Letter dated July 15, 1958, with attached pages 6, 8, 9 and 10 of tendered findings of fact and conclusions of law; Plaintiff's objections to the findings of fact, conclusions of law and judgment tendered by defendant; Plaintiff's objection to conclusion of law VI and to the proposed judgment order declaring defendant to be the prevailing party, etc.; Findings of fact and conclusions of law; Judgment order; Notice of appeal; Bond for costs on appeal; Order extending time to docket appeal; Stipulation and order to transmit exhibits to Court of Appeals; Stipulation designating portions of record to be contained in record on appeal; Appellee's designation of additional portions of record on appeal and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8695, in which John N. Seaver, Jr., is the plaintiff and appellant and United States Plywood Corporation is the defendant and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellee, and in accordance with the rules of this court.

I further certify that there is enclosed herewith three copies of orders from the Court of Appeals extending time to docket appeal. And under separate cover we are forwarding the reporter's tran-

script of proceedings in two volumes. All exhibits are being shipped by auto freight.

I further certify that the cost of filing the notice of appeal, \$5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 5th day of February, 1959.

[Seal] R. DE MOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 16357. United States Court of Appeals for the Ninth Circuit. John N. Seaver, Jr., Appellant, vs. United States Plywood Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed and Docketed: February 6, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16357

JOHN N. SEAVER, JR.,

Plaintiff-Appellant,

vs.

UNITED STATES PLYWOOD CORPORA-
TION,

Defendant-Respondent.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

On this appeal, plaintiff-appellant will rely on the following points:

(1) Trial court erred (a) in granting plaintiff-appellant a judgment for only \$80.00; (b) in failing to find and conclude that subsequent to January 1, 1953, defendant-respondent and its predecessor intentionally trespassed upon the land involved and wilfully cut and removed therefrom over 4,414,000 feet of old growth and second-growth fir, hemlock and cedar trees and timber which were not merchantable on May 4, 1942, or which had been abandoned by them and in which they had relinquished all interest, and (c) in failing to award plaintiff-appellant a judgment for three times the value of the timber so removed.

(2) Under the May 4, 1942, contract, defendant-respondent and its predecessor were entitled to remove only the old growth and second-growth fir and hemlock timber which was merchantable on May 4, 1942, and not that which may have become merchantable thereafter.

(3) The words "merchantable timber" contained in the May 4, 1942, contract are unambiguous, and it has never been the law in Oregon that "merchantable timber" is that timber which has commercial value during the life or term of the contract so that the trial court erred in receiving evidence to interpret the contract.

KOERNER, YOUNG,
McCOLLOCH &
DEZENDORF,

/s/ JAMES C. DEZENDORF,
Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed February 10, 1959.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties hereto that all the exhibits offered and received during the trial and all exhibits offered but not received during the trial need not be printed in connection with the appeal to the United States Court of Appeals for the Ninth Circuit.

/s/ JAMES C. DEZENDORF,
Of Attorneys for Appellant.

/s/ HUGH I. BIGGS,
Of Attorneys for Appellee.

[Endorsed]: Filed February 16, 1959.

No. 16357

United States
Court of Appeals
for the Ninth Circuit

JOHN N. SEAVER, JR.,

Appellant.

vs.

UNITED STATES PLYWOOD CORPORA-
TION,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 246)

FILED
MAY 10 1959
PAUL F. O'BRIEN, CLERK

Appeal from the United States District Court
for the District of Oregon.

No. 16357

**United States
Court of Appeals**
for the Ninth Circuit

JOHN N. SEAVER, JR.,

Appellant.

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**Appeal from the United States District Court
for the District of Oregon.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court
for the District of Oregon

Civil No. 8695

JOHN N. SEAVER, JR.,

Plaintiff,

vs.

UNITED STATES PLYWOOD CORPORATION,

Defendant.

AMENDED COMPLAINT

I.

Plaintiff is a citizen of the State of Oregon, and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

Since October 2, 1942, plaintiff and his assignors have been and plaintiff now is the owner of the following described real property to wit:

The Southeast quarter, the Southeast quarter of the Northeast quarter, and the Southeast quarter of the Southwest quarter and Lot 4, of Section 31, Township 18 South, Range 9 West, of the Willamette Meridian.

Lots 3, 4, 6 and 7 and the East half of the Northwest quarter of the Southeast quarter, and the East half of the West half of the Northwest quarter of the Southeast quarter of

Section 6, Township 19 South, Range 9 West of the Willamette Meridian. Lot 1 of Section 1, Township 19 South, Range 10 West of the Willamette Meridian, all in Lane County, Oregon.

together with all trees and timber thereon, except that old growth and second growth fir and hemlock which was merchantable on May 4, 1942.

III.

Subsequent to June 24, 1950, and prior to August 10, 1955, Siuslaw Forest Products, Inc., a Washington corporation and defendant intentionally trespassed upon said land and wilfully cut and removed therefrom over 5,000,000 feet of old growth and second growth fir and hemlock trees and timber which was not merchantable on May 4, 1942, and other species of trees and timber thereon to plaintiff's damage in the sum of \$100,000.00.

IV.

G. E. Tucker and Marilla W. Tucker, husband and wife and S. W. Tucker and Dorothy S. Tucker, husband and wife, who owned the property described in Paragraph II from October 2, 1942, to June 24, 1952, when plaintiff acquired it, have assigned their claim against Siuslaw Forest Products, Inc., and defendant to plaintiff herein.

V.

Defendant has assumed and agreed to pay all debts, claims and obligations of Siuslaw Forest Products, Inc.

Wherefore, plaintiff prays for a judgment against defendant for treble the amount of \$100,000.00 or \$300,000.00, together with its costs and disbursements herein incurred.

BAILEY, HOFFMAN &
SPENCER,

/s/ LEWIS HOFFMAN,

KOERNER, YOUNG,
McCOLLOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,
Attorneys for Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed November 23, 1956.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Defendant for answer to the amended complaint herein admits, denies and alleges as follows:

First Defense

The amended complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

A portion of the right of action set forth in the amended complaint did not accrue within six years next prior to the commencement of this action.

Third Defense

A portion of the right of action for treble damages set forth in the amended complaint did not accrue within three years next prior to the commencement of this action.

Fourth Defense

Defendant admits the allegations of Paragraph 1 and that plaintiff is the owner of the real property described in Paragraph 2 of the amended complaint; alleges that it is without knowledge or information sufficient to form a belief as to Paragraph 4 of the amended complaint; and denies each and every other allegation in said amended complaint except as hereinafter affirmatively alleged.

Fifth Defense

Plaintiff is estopped to maintain this action by reason of the following circumstances:

I.

Prior to May 4, 1942, Marvin T. Warlick and Thelma G. Warlick, husband and wife (hereinafter called "Warlicks"), were the owners of the lands described in plaintiff's amended complaint, together with the timber thereon. On or about May 4, 1942, the Warlicks entered into a certain "Timber Sales Agreement" with Siuslaw Forest Products, Inc., a corporation (hereinafter called "Siuslaw").

II.

By the terms of said agreement the Warlicks agreed to sell to Siuslaw "All of the merchantable

old growth and second growth fir and hemlock timber either standing or down and now growing or located" upon the lands described in plaintiff's complaint. Said agreement also provided as follows:

"It is expressly understood that the Vendee shall have twenty (20) years from the date hereof within which to commence the cutting and removal of said timber and such additional time as may be reasonably necessary, not to exceed five years, to complete the cutting and removal of the timber sold and purchased hereunder, all provided that the initial operation of cutting and removal shall be commenced within twenty years from the date hereof."

III.

Said Timber Sales Agreement also provided that the vendee of the timber should pay "any and all taxes and fire patrol assessments or other assessments if any there be, lawfully levied and assessed against said timber (exclusive of the land)."

IV.

Subsequent to the execution of said agreement, defendant acquired the rights of Siuslaw under said agreement and plaintiff, by mesne conveyances, acquired the title to the lands covered thereby and described in plaintiff's amended complaint.

V.

Subsequent to May 4, 1942, and prior to the expiration of twenty years from May 4, 1942, Siuslaw

and defendant engaged in the cutting and removal of the merchantable timber from the lands covered by the agreement. All timber cut and removed from said property by defendant and Siuslaw were so cut and removed by them in the belief that they were entitled to do so under said contract, and with the knowledge, consent and acquiescence of plaintiff and his predecessors in interest.

VI.

In reliance on the existence of its right to cut and remove said timber, on or about August 10, 1955, defendant entered into a certain logging contract with plaintiff covering a portion of the lands described in plaintiff's amended complaint. Said contract recited that defendant was the owner of the timber described therein and provided that plaintiff should log said timber for defendant at an agreed rate of compensation. Plaintiff executed said contract knowing that defendant believed in, asserted, and relied on the existence of its rights under the Timber Sales Agreement. Plaintiff entered the lands described in said logging contract, logged the timber therefrom and accepted defendant's payment for his services.

VII.

In further reliance on the existence of its rights under the Timber Sales Agreement, defendant at all times material herein paid all taxes and assessments on the timber located on said property. Defendant made all such payments at the request of and with the knowledge, acquiescence, and consent of plain-

tiff and in reliance on the existence of its rights under the Timber Sales Agreement, which reliance was known to plaintiff.

Wherefore defendant, having fully answered plaintiff's amended complaint, prays that the same be dismissed, that plaintiff take nothing thereby and that defendant have and recover from plaintiff its costs and disbursements herein.

/s/ M. B. STRAYER,

/s/ DONALD HUSBAND,

/s/ G. C. HAZARD, JR.,

Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed December 16, 1956.

[Title of District Court and Cause.]

PRETRIAL ORDER

The above-entitled action came on regularly for a pretrial conference before the undersigned judge of the above-entitled court on Monday, April 21, 1958, at 10:00 a.m. Plaintiff appeared by and through James C. Dezendorf and Lewis Hoffman of his attorneys. Defendant appeared by and through Hugh L. Biggs and Donald Husband of its attorneys. No demand for a jury trial of any issue of fact having been made by either party, the action will be tried before the court without a jury. The following facts have been agreed to for the purpose of this action:

Agreed Facts

I.

Plaintiff is a citizen of the State of Oregon, and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

On May 4, 1942, Marvin T. Warlick and Thelma G. Warlick, husband and wife, were the owners of the following described real property, to wit:

The Southeast quarter, the Southeast quarter of the Northeast quarter, and the Southeast quarter of the Southwest quarter and Lot 4, of Section 31, Township 18 South, Range 9 West, of the Willamette Meridian.

Lots 3, 4, 6 and 7 and the East half of the Northwest quarter of the Southeast quarter, and the East half of the West half of the Northwest quarter of the Southeast quarter of Section 6, Township 19 South, Range 9 West, of the Willamette Meridian. Lot 1 of Section 1, Township 19 South, Range 10 West, of the Willamette Meridian, all in Lane County, Oregon.

together with all trees and timber thereon.

III.

On the 4th day of May, 1942, said Warlicks entered into a timber sales agreement with Siuslaw Forest Products, Inc., by the terms of which the

Warlicks agreed, among other things, to sell to Siuslaw and Siuslaw agreed to purchase and remove "all of the merchantable old growth and second growth fir and hemlock timber either standing or down and now growing or located" upon the real property above described, which said agreement also provided as follows:

"It is expressly understood that the Vendee (Siuslaw) shall have twenty (20) years from the date hereof within which to commence the cutting and removal of said timber and such
..... not to exceed five years, additional time as may be reasonably necessary to complete the cutting and removal of the timber sold and purchased hereunder, all provided that the initial operation of cutting and removal shall be commenced within twenty years from the date hereof."

That Siuslaw should pay "any and all taxes and fire patrol assessments or other assessments if any there be, lawfully levied and assessed against said timber (exclusive of the land) commencing with the 1942-1943 taxes throughout the life of this agreement and until the timber purchased and sold hereunder shall have been cut and removed or the same abandoned by the Vendee (Siuslaw)."

IV.

On October 29, 1942, the Warlicks conveyed to G. E. Tucker and Marilla W. Tucker, husband and

wife, and S. W. Tucker and Dorothy S. Tucker, husband and wife, the real property described above, except for the timber upon the premises theretofore sold by grantors (Warlicks) under that certain contract recorded at Volume 232, page 615, Lane County, Oregon, deed records.

V.

On the 14th day of July, 1952, the Tuckers, referred to in paragraph IV, entered into a contract with the plaintiff, wherein the Tuckers agreed to sell and plaintiff agreed to buy all of the Tuckers' interest in the real property above described, except for the timber upon the premises theretofore sold by the grantors under that certain contract recorded at Volume 232, page 615, Lane County, Oregon, deed records. Subsequently, pursuant to the terms of the said contract, the Tuckers conveyed to plaintiff the real property above described, except for the timber upon the premises theretofore sold by the grantors under that certain contract recorded at Volume 232, page 615, Lane County, Oregon, deed records.

VI.

On the 1st day of May, 1953, defendant United States Plywood Corporation acquired all of the assets and assumed all of the liabilities of Siuslaw Forest Products, Inc., and thereafter caused Siuslaw to be dissolved.

VII.

On November 16, 1956, the Tuckers executed and delivered to plaintiff a document entitled "Assignment," wherein the Tuckers undertook to assign all

their right, title and interest in and to any and all claims they then had or in the past had had against Siuslaw Forest Products, Inc., and/or defendant arising from or in any way connected with the timber or timber rights located on the real property above described, or in any way connected therewith from the date the Tuckers acquired the right to possession of said real property and the timber thereon to the date that they sold it to plaintiff.

VIII.

Defendant paid certain taxes and assessments on the timber located on the real property above described.

IX.

In the year 1949, defendant's predecessor, Siuslaw Forest Products, Inc., commenced logging operations on the real property above described. Thereafter said logging operations were carried on from time to time by said Siuslaw Forest Products, Inc., and/or defendant until the year 1956. During the period between 1949 and 1956, defendant and its predecessor, Siuslaw Forest Products, Inc., cut and removed the following species and quantity of timber from the said real property:

Description	M Board Feet
Old growth Douglas fir.....	6,730
Second growth Douglas fir.....	4,156
Hemlock	591
Cedar	8
	<hr/>
	11,485

X.

Plaintiff and defendant entered into a certain logging contract dated August 10, 1955, pursuant to which plaintiff, as a logger for defendant, cut and removed 108 M board feet of the total timber described in paragraph IX above from portions of the real property above described and delivered the same to defendant. Some of the timber on the premises cut by plaintiff was not removed therefrom.

XI.

Plaintiff made no objection or remonstrance to defendant or its predecessor about the quantity, quality, size or species of the timber which they were cutting and removing from said premises until the spring of 1956.

Plaintiff's Contentions

I.

Subsequent to June 24, 1950, defendant and its predecessor intentionally trespassed upon the land involved and wilfully cut and removed therefrom (a) over five million feet of old growth and second growth fir and hemlock trees and timber (1) which was not merchantable on May 4, 1942, or (2) which had been abandoned, and in which they had relinquished their interest, and (b) other species of trees and timber thereon, of the value of over \$100,000, and that plaintiff is entitled to recover from defendant \$300,000 together with his costs and disbursements herein incurred.

II.

Under the May 4, 1942, contract Siuslaw and defendant, as its successor, was entitled to remove only the old growth and second growth fir and hemlock timber which was merchantable on May 4, 1942, and not that which may have become merchantable thereafter.

III.

The words "merchantable timber" contained in the May 4, 1942, contract are clear and unambiguous, and it has never been the law in Oregon that "merchantable timber" is that timber which has commercial value during the life or term of the contract so that extrinsic evidence may not be introduced to interpret the contract.

IV.

Plaintiff is entitled to recover treble damages for the removal subsequent to June 24, 1950, by defendant and its predecessor of 8,000 board feet of cedar timber not conveyed by the May 4, 1942, contract.

V.

If there was any merchantable timber left on the land involved on June 24, 1950 (which plaintiff denies), defendant's predecessor had abandoned or relinquished its interest therein prior to June 24, 1950.

VI.

Under the facts and circumstances in this action, estoppel is not available to defendant as a defense.

VII.

Plaintiff is not estopped by his conduct or by any

alleged consent from recovering all or any of the damages otherwise recoverable by him in this action.

VIII.

The proper statute of limitations involved in this action with respect to plaintiff's right to recover single, double or treble damages is six years, and the six year statute is applicable from the date of the filing of the complaint herein and not from the date of filing of the amended complaint.

IX.

A cause of action for trespass to lands and timber thereon is assignable, and plaintiff by the assignment involved acquired the right of action of his predecessors against defendant's predecessor and defendant is liable therefor.

X.

It is no defense to the claim herein for double or treble damages that defendant or its predecessor acted under a mistake of law in removing the timber based upon an erroneous construction of the May 4, 1942, contract.

XI.

None of the second growth fir and hemlock timber and only a portion of the old growth timber removed from the land involved by defendant and its predecessor in interest on or after June 24, 1950, was merchantable on May 4, 1942.

Defendant's Contentions

I.

All of the timber cut and removed by defendant and Siuslaw Forest Products, Inc., was merchantable on May 4, 1942.

II.

It was the intention of the parties to the contract of May 4, 1942, to sell and purchase all of the timber located on the real property described in the complaint which was or should become merchantable during the life of the contract, and, pursuant to the intention of the parties to the contract and consistent with their subsequent conduct, all of the timber removed by defendant or its predecessor, Siuslaw Forest Products, Inc., was conveyed to Siuslaw Forest Products, Inc.

III.

The provisions of the contract of May 4, 1942, are ambiguous with respect to the timber conveyed thereby and extrinsic evidence is admissible to show the intention of the parties and all the circumstances attending the transaction.

IV.

Although the cedar timber was not specifically mentioned in the contract of May 4, 1942, the volume and value thereof was so small as to be de minimis.

V.

Defendant denies it ever relinquished or abandoned any of its rights in or to any of the timber conveyed by the contract of May 4, 1942.

VI.

Plaintiff is estopped from asserting any claim for damages for timber removed from the premises after he became the owner of the land upon which it was growing because of his failure to make any objection to the cutting and removing of the timber although he had knowledge of the actions of the defendant and/or its predecessor in logging the same, and because of his acquiescence and participation in the cutting and removal of a portion of the timber.

VII.

Plaintiff did not acquire by assignment from his predecessors, the Tuckers, any rights which may be asserted against defendant in this action.

VIII.

Plaintiff is barred from maintaining an action for the recovery of the value of any timber removed from the premises more than six years prior to the filing of the amended complaint herein on the 23rd day of November, 1956.

IX.

In any event plaintiff is barred from maintaining an action for the recovery of treble damages for any timber removed more than three years prior to the filing of the amended complaint herein on the 23rd day of November, 1956.

X.

The timber referred to in paragraph IX of the Agreed Facts was removed by defendant and its

predecessor in good faith in the reasonable belief that they were entitled thereto under the terms of the contract dated May 4, 1942.

XI.

Plaintiff is not entitled to recover damages in any sum from defendant.

Issues of Fact

I.

How much of the fir and hemlock timber, if any, removed by defendant and its predecessor in interest within the limitations periods applicable to this action, was not merchantable within the meaning of the May 4, 1942, contract?

II.

Did defendant or its predecessor in interest abandon or relinquish their interest in any timber that was merchantable within the meaning of the May 4, 1942 contract, and if so, when?

III.

How much timber, if any, was removed by defendant or its predecessor within the limitations periods applicable to this action after it had been abandoned or their interest therein had been relinquished?

IV.

If defendant is liable to plaintiff for the removal of any timber, what was the value of each species of

timber for which it is liable at the time it was removed?

V.

If defendant is liable to plaintiff for the removal of any timber, was its conduct or that of its predecessor in interest such as to make defendant liable for double or treble damages?

Plaintiff's Contended Issues of Fact

I.

When did plaintiff first learn that under the May 4, 1942, contract defendant and its predecessor in interest were only entitled to remove that fir and hemlock timber which was merchantable on May 4, 1942?

II.

Did plaintiff in any way intentionally mislead defendant or its predecessor in interest after acquiring such knowledge?

III.

Did defendant or its predecessor in interest change its or their position in any way to its or their detriment in reliance upon any action or conduct of plaintiff which took place after the plaintiff first learned that defendant and its predecessor had taken timber from his land to which they were not entitled?

Defendant's Contended Issue of Fact

I.

Did plaintiff and his predecessors consent to the cutting and removal by defendant and its predecessor of any or all of the timber removed within the applicable limitations?

Issues of Law

I.

Under the May 4, 1942, contract was Siuslaw or defendant, as its successor, entitled to remove only the old growth and second growth fir and hemlock timber which was merchantable on May 4, 1942, and not that which may have become merchantable thereafter?

II.

May extrinsic evidence be introduced to show the intention of the parties with respect to the timber conveyed by said contract?

III.

Is plaintiff entitled to recover single, double or treble damages for the removal by defendant or its predecessor of 8,000 board feet of cedar timber?

IV.

Under the facts and circumstances in this action, did defendant or defendant's predecessor in interest abandon or relinquish its interest in any timber on the land involved prior to the time of its removal?

V.

Under the facts and circumstances in this action is estoppel available to defendant as a defense?

VI.

Is plaintiff estopped by his conduct or by any alleged consent from recovering all or any of the damages otherwise recoverable by him in this action?

VII.

If any right or rights of action against defendant accrued to plaintiff, what limitation period or periods is or are applicable to such right or rights?

VIII.

Is the applicable period or are the applicable periods of limitations measured from the date of the filing of the original complaint herein or from the date of the filing of the amended complaint herein?

IX.

Did plaintiff acquire the right or rights of action of his predecessors against defendant and its predecessor by virtue of the assignment involved?

X.

If defendant cut and removed any timber from plaintiff's property which was not conveyed by the contract, would it be liable in double or treble damages therefor if it were done under a mistake of law

based upon an erroneous construction of the May 4, 1942, contract?

XI.

If plaintiff consented to the removal by defendant or its predecessor of all or any of the timber involved herein, is he barred from recovering all or any of the damages otherwise recoverable by him in this action?

The foregoing pretrial order, having been approved by the parties, is hereby entered herein, and it shall not be amended at the trial, except by consent of the parties and with the approval of the Court, except to prevent manifest injustice.

/s/ JAMES C. DEZENDORF,
Of Attorneys for Plaintiff.

/s/ HUGH L. BIGGS,
Of Attorneys for Defendant.

Dated at Portland, Oregon, this 12th day of May, 1958.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed May 12, 1958.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on regularly for trial before the undersigned, a judge of this court, sitting at Eugene, Oregon, on the 14th day of May, 1958. Plaintiff appeared in person and by James C. Dezendorf and Lewis Hoffman, his attorneys. Defendant appeared by Hugh L. Biggs, Robert H. Huntington and Donald R. Husband, its attorneys.

The parties, having waived trial by jury, thereupon offered testimony and evidence in support of their respective contentions and rested. The court, having considered all matters of fact and law arising on the pretrial order and presented by the parties and now being fully advised, makes the following

Findings of Fact

The parties stipulated certain facts which were set forth in the pretrial order as Agreed Facts. They are adopted and set forth herein immediately following as part of the court's findings, being paragraph numbers I to XI, inclusive.

I.

Plaintiff is a citizen of the State of Oregon, and defendant is a corporation incorporated under the laws of the State of New York. The matter in

controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

On May 4, 1942, Marvin T. Warlick and Thelma G. Warlick, husband and wife, were the owners of the following described real property, to wit:

The Southeast quarter, the Southeast quarter of the Northeast quarter, and the Southeast quarter of the Southwest quarter and Lot 4, of Section 31, Township 18 South, Range 9, West of the Willamette Meridian.

Lots 3, 4, 6 and 7 and the East half of the Northwest quarter of the Southeast quarter, and the East half of the West half of the Northwest quarter of the Southeast quarter of Section 6, Township 19 South, Range 9 West of the Willamette Meridian. Lot 1 of Section 1, Township 19 South, Range 10 West of the Willamette Meridian, all in Lane County, Oregon

together with all trees and timber thereon.

III.

On the 4th day of May, 1942, said Warlicks entered into a timber sales agreement with Siuslaw Forest Products, Inc., by the terms of which the Warlicks agreed, among other things, to sell to Siuslaw and Siuslaw agreed to purchase and remove "all of the merchantable old growth and second growth

fir and hemlock timber either standing or down and now growing or located" upon the real property above described, which said agreement also provided as follows:

"It is expressly understood that the Vendee (Siuslaw) shall have twenty (20) years from the date hereof within which to commence the cutting and removal of said timber and such not to exceed five years, additional time as may be reasonably necessary to complete the cutting and removal of the timber sold and purchased hereunder, all provided that the initial operation of cutting and removal shall be commenced within twenty years from the date hereof."

That Siuslaw should pay "any and all taxes and fire patrol assessments or other assessments if any there be, lawfully levied and assessed against said timber (exclusive of the land) commencing with the 1942-1943 taxes throughout the life of this agreement and until the timber purchased and sold hereunder shall have been cut and removed or the same abandoned by the Vendee (Siuslaw)."

IV.

On October 29, 1942, the Warlicks conveyed to G. E. Tucker and Marilla W. Tucker, husband and wife, and S. W. Tucker and Dorothy S. Tucker, husband and wife, the real property described

above, except for the timber upon the premises theretofore sold by grantors (Warlicks) under that certain contract recorded at Volume 232, Page 615, Lane County, Oregon, deed records.

V.

On the 14th day of July, 1952, the Tuckers, referred to in paragraph IV, entered into a contract with the plaintiff, wherein the Tuckers agreed to sell and plaintiff agreed to buy all of the Tuckers' interest in the real property above described, except for the timber upon the premises theretofore sold by the grantors under that certain contract recorded at Volume 232, Page 615, Lane County, Oregon, deed records. Subsequently, pursuant to the terms of the said contract, the Tuckers conveyed to plaintiff the real property above described, except for the timber upon the premises theretofore sold by the grantors under that certain contract recorded at Volume 232, Page 615, Lane County, Oregon, deed records.

VI.

On the 1st day of May, 1953, defendant United States Plywood Corporation, acquired all of the assets and assumed all of the liabilities of Siuslaw Forest Products, Inc., and thereafter caused Siuslaw to be dissolved.

VII.

On November 16, 1956, the Tuckers executed and delivered to plaintiff a document entitled "Assignment," wherein the Tuckers undertook to assign all their right, title and interest in and to any and

all claims they then had or in the past had had against Siuslaw Forest Products, Inc., and/or defendant arising from or in any way connected with the timber or timber rights located on the real property above described, or in any way connected therewith from the date the Tuckers acquired the right to possession of said real property and the timber thereon to the date that they sold it to plaintiff.

VIII.

Defendant paid certain taxes and assessments on the timber located on the real property above described.

IX.

In the year 1949 defendant's predecessor, Siuslaw Forest Products, Inc., commenced logging operations on the real property above described. Thereafter said logging operations were carried on from time to time by said Siuslaw Forest Products, Inc., and/or defendant until the year 1956. During the period between 1949 and 1956, defendant and its predecessor, Siuslaw Forest Products, Inc., cut and removed the following species and quantity of timber from the said real property:

Description	M Board Feet
Old growth Douglas fir	6,730
Second growth Douglas fir	4,156
Hemlock	591
Cedar	8
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Total	11,485

X.

Plaintiff and defendant entered into a certain logging contract dated August 10, 1955, pursuant to which plaintiff, as a logger for defendant, cut and removed 108 M board feet of the total timber described in paragraph IX about from portions of the real property above described and delivered the same to defendant. Some of the timber on the premises cut by plaintiff was not removed therefrom.

XI.

Plaintiff made no objection or remonstrance to defendant or its predecessor about the quantity, quality, size or species of the timber which they were cutting and removing from said premises until the spring of 1956.

The court finds from the evidence introduced on the trial the following additional facts:

XII.

The land upon which the timber in question was situated (hereinafter referred to as the Seaver tract) is in the Coastal Range near the community of Mapleton in Lane County, Oregon. The predominant species and grades of timber in that area were those described in the contract of May 4, 1942. At that time and for years prior thereof, it was the prevailing custom and practice in the area to purchase timber by the stand rather than by individual trees. These transactions commonly involved either the purchase of the fee, together with the timber

thereon, or the timber as a separate estate from the land.

XIII.

In 1942 and subsequent years, including the period during which defendant and Siuslaw cut and removed timber from the Seaver tract, customary logging practices in the fir and hemlock regions in Western Oregon, including the Mapleton area, consisted of so-called high lead or donkey logging whereby specific stands being logged were logged clean, except for seed trees, in that individual trees within a particular stand which were not actually felled and bucked, were nevertheless knocked down or destroyed as a necessary incident of the logging operations. Good logging and forestry practices required that timber which was not removed from the logged area for use be burned as slash.

XIV.

In the Mapleton area, as well as other fir-growing areas, in 1942, old growth fir produced peeler logs which were then in increasing demand in the plywood industry as well as saw logs for which there was then and for many years prior thereto had been an active and ready market. Although old growth fir was in greater demand than second growth fir, nevertheless a substantial and growing demand then existed in this area for second growth fir stands, second growth fir logs and second growth fir products, such as poles, piling and numerous manufactured products, including car decking, ties,

bridge decking, studs, planks, siding and other lumber products for building and construction purposes.

Hemlock logs, in 1942 and in years prior and subsequent thereto, were being regularly sold primarily for pulp to paper manufacturers in the State of Oregon. In 1941 and 1942, Siuslaw was engaged in logging hemlock timber on other tracts in the general vicinity of the Seaver tract and selling it for pulp to Crown Zellerbach, a paper manufacturing company.

XV.

The Seaver tract in 1942 was inaccessible for immediate logging in that it was located in a rugged and rough area into which no logging roads had been constructed. The Warlicks had purchased the tract in 1935 for use as a family recreational retreat. Mr. Warlick negotiated the contract with Siuslaw for the purpose of converting into cash the value of the timber. It was Warlick's desire that the timber not be severed and removed immediately. Warlick sought out Siuslaw as a likely purchaser of the timber because Siuslaw had acquired substantial blocks of timber in adjacent areas, some of which were directly contiguous to the Seaver tract.

XVI.

At the time the parties were negotiating the timber purchase contract, Siuslaw was planning a multipurpose logging program for the utilization of its timber in the Mapleton area, not merely for saw logs but also for poles, piling, bridge decking, ties, pulp and other lumber products. It had embarked

upon the construction of a logging road toward and into part of its lands adjacent to the Seaver tract. It was completing construction of a lumber mill at Mapleton for the purpose of sawing and processing logs from its timber in that area and it was interested in acquiring lands contiguous to its other holdings.

In May of 1942 and immediately prior thereto during the negotiations between Siuslaw and Warlick for the purchase of the timber on the Seaver tract, the parties did not know when the tract would become operable because of many factors then undetermined. For instance, they did not know when the logging road would be extended to the Seaver tract or precisely in what manner or at what time the tract would be logged. These factors would be governed by future development of Siuslaw's over-all logging program. In view of these uncertainties and of Warlick's willingness that the commencement of the logging be delayed, they agreed on a relatively long period of time, that is, a total period of twenty-five years, within which Siuslaw might cut and remove the timber from the tract.

XVII.

Warlick and Siuslaw actually agreed and intended by their agreement to sell and to purchase all of the old growth and second growth fir and hemlock suitable for the purposes above described at the time the contract was negotiated, or which Siuslaw might consider suitable therefor at any time during the life of the contract. The parties did not intend

by the terms of the contract to limit the taking of any of the old growth or second growth fir or hemlock by Siuslaw from the Seaver tract during the life of the contract. They intended and agreed that Siuslaw was privileged to take so much of the timber as it might choose during the term of the contract.

XVIII.

The Tuckers, who purchased the fee from Warlick, and plaintiff, who purchased the fee from the Tuckers, at all times knew of the original intention of the parties with respect to the grades, species and quantity of timber conveyed, and neither the Tuckers nor the plaintiff believed that their respective deeds to the fee vested in them any rights in any of the fir and hemlock which defendant or Siuslaw desired to remove from the tract.

XIX.

The first logging on the Seaver tract was done in 1949. Logging continued each year thereafter until the end of the year 1955. More than half of the total amount of the timber described in Finding No. IX was removed during the years 1949 and 1950. Only a small area was logged in 1951. In 1952 timber was felled, bucked and cold decked but was not removed therefrom until the following year. Major logging on this tract was carried on during the years 1953 and 1955. In 1954 there was an inconsiderable amount of logging on the tract because of a general strike.

The parties stipulated at the trial, and the court finds in accordance therewith, that excluding any timber removed from the property by the plaintiff in 1955 pursuant to his logging contract with defendant, the following species and quantities were removed by defendant or Siuslaw between January 1, 1953, and December 30, 1955:

Species	M Board Feet
Old growth fir	850
Second growth fir	3,125
Hemlock	431
Cedar	8
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Total	4,414

XX.

The Seaver tract was logged as a part of Siuslaw's and defendant's entire holdings in the Mapleton area at all times in a manner consistent with defendant's and Siuslaw's mill inventory requirements and other practical considerations, including the development of a main logging road and spur logging roads. Interruptions in the logging of the Seaver tract were not intended to and did not operate as a relinquishment or abandonment by defendant or Siuslaw of any of the timber thereon.

XXI.

According to the prevailing standards of merchantability in the area, all of the fir and hemlock timber removed by defendant and Siuslaw as above stated was in fact merchantable on May 4, 1942.

XXII.

Both plaintiff and the Tuckers, during the respective periods each owned the fee, requested and received reimbursement from defendant or Siuslaw of fire patrol assessments and that portion of the real property taxes allocable to the timber.

XXIII.

During the entire period that defendant and Siuslaw conducted logging operations upon the Seaver tract, plaintiff lived in close proximity to the tract and was personally familiar with the nature and extent of logging operations being conducted thereon. During this period plaintiff did not have any objection to the severance and removal by defendant and Siuslaw of the fir and hemlock timber for which plaintiff seeks damages in this action.

XXIV.

The conduct of plaintiff and the Tuckers in requesting and obtaining reimbursement of property taxes allocable to the timber and fire patrol assessments, and in failing to protest or object to the cutting and removal of the timber during the course of the logging operations evidences their knowledge of the intention of the original parties to the contract. Additionally, plaintiff, by entering into the logging contract referred to in paragraph X hereof and thereby agreeing that defendant was the owner of all the fir and hemlock timber on the tract and by cutting and removing for defendant some 108,000 board feet of timber from the tract pursuant to

said logging contract, evidenced not merely his consent to the removal of that timber but also his understanding that all of the other fir and hemlock timber removed by defendant had been sold to Siuslaw pursuant to the terms of the contract of May 4, 1942, as understood and construed by the parties thereto.

XXV.

Neither defendant nor Siuslaw ever relinquished or abandoned any of its rights in or to any of the fir and hemlock timber which it acquired by the contract of May 4, 1942.

The logging affidavits filed in 1950 and 1951 by Frank McPherson (logging superintendent for Siuslaw) with the Lane County Assessor stating that all of the merchantable fir and hemlock timber had been removed from a large segment of the Seaver tract, were intended by McPherson to reflect the status of the initial timber inventory in Siuslaw's timber depletion records. This initial inventory had been recorded without the benefit of a cruise or other accurate information as to volume and represented only an estimate of the amount of Siuslaw's timber holdings on the Seaver tract and surrounding and adjacent tracts.

When McPherson filed the logging affidavits, he had not personally inspected the entire Seaver tract, and was unaware of large tracts of remaining timber thereon in ravines and on ridge slopes into which spur logging roads had not yet been constructed. The terrain of these ravines and ridge

slopes on which the remaining timber stood was comparable to the terrain of other portions of the Seaver tract theretofore logged by Siuslaw. McPherson made and filed the affidavits in good faith without intending to mislead or deceive the County Assessor, and the record does not establish that the Assessor was in fact misled or deceived. On the other hand, defendant did pay taxes on the remaining timber after the McPherson affidavits were filed. McPherson was not an officer of Siuslaw or of defendant and was not authorized in preparing and filing the affidavits to relinquish, abandon or in any way prejudice his employer's title to any of the timber, and he did not intend to do so either by the filing of the logging affidavits or by his conduct in any other particular.

XXVI.

The 8,000 board feet of cedar referred to in paragraph IX hereof consisted of only five trees. It was not included in the contract of May 4, 1942, and defendant so admitted on the trial. The value of the cedar was stipulated by the parties to be \$5 per thousand board feet at the time of its severance, or a total of \$40. The circumstances surrounding the cutting and removal of the cedar do not evidence such intentional or wilful wrongdoing on the part of defendant as to justify treble damages.

XXVII.

Siuslaw and defendant, in all of their respective logging operations upon the Seaver tract, cut and removed the fir and hemlock timber therefrom in a

bona fide belief that they were the owners of such timber and were entitled to cut and remove the same from said tract under the terms of the contract of May 4, 1942.

From the foregoing findings of fact, the court draws the following

Conclusions of Law

I.

The cutting and removal of the cedar timber was casual and involuntary, and plaintiff is entitled to judgment against defendant in the sum of \$80, being double the value thereof.

II.

The term "merchantable" as used in relation to the timber described in the contract of May 4, 1942, in and of itself involves some ambiguity concerning the intention of the parties to the contract, requiring a consideration of the circumstances surrounding the parties at the time the contract was made and the attitude of the parties toward the subject matter subsequent to the execution of the contract. As intended, used and construed by the original parties to the contract and their successors in interest, the terms "all of the merchantable old growth and second growth fir and hemlock timber either standing or down and now growing or located," included all of the fir and hemlock timber cut and removed by defendant and Siuslaw.

III.

Defendant owned and was privileged to cut and remove all of the old growth and second growth fir and hemlock timber for which claim is made by plaintiff against defendant.

IV.

Plaintiff consented to the removal by defendant and Siuslaw of all of the fir and hemlock timber for which he claims damages in this action.

V.

Neither the defendant nor Siuslaw intended to or did relinquish or abandon any of its rights to the timber involved.

VI.

Defendant is the prevailing party and is entitled to its costs incurred herein.

Done and dated this day of, 1958.

.....,

United States District Judge.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT TENDERED BY DEFENDANT

Comes now plaintiff and makes and files the following objections to the Findings of Fact, Con-

clusions of Law and Judgment tendered by the defendant herein.

Findings of Fact

I.

Plaintiff objects to proposed Finding XII, commencing with the words "At that time" in line 2 on page 6 thereof, through the balance of said Finding for the reasons and upon the grounds that (a) there is no evidence to support this portion of the proposed Finding; (2) it is not in accord with the undisputed testimony which was that there were four methods in use in Lane County in May of 1942 for selling and purchasing timber, which were, first, purchase and sell the land, which of course would include the growing timber; second, purchase and sell all the timber but not the land; third, purchase and sell specified or all of the merchantable timber but not the land, and fourth, purchase and sell specified or all of the timber above certain diameters.

II.

Plaintiff objects to proposed Finding XIII for the reasons and upon the grounds that (a) there is no evidence to support it; (b) what customary or good logging practices may or may not have been is not relevant to any issue involved in this proceeding, and (c) there is no evidence in the case that any such customary or good logging practices were performed in connection with the logging of the timber involved.

III.

Plaintiff objects to proposed Finding XIV for the reasons and upon the grounds that (a) there is no evidence to support it; (b) under the uncontradicted evidence the second growth timber on the land involved was not suitable for poles or piling, and (c) the Finding is not relevant to any issue involved in this proceeding.

IV.

Plaintiff objects to proposed Finding XV, commencing with the words "Mr. Warlick negotiated" in line 11 on page 7 thereof, through the balance of said Finding for the reasons and upon the grounds that (a) there is no evidence to support it, and (b) it is not relevant to any issue involved in this proceeding.

V.

Plaintiff objects to the first paragraph of proposed Finding XVI, commencing with the words "At the time" in line 19 on page 7 thereof, through line 28 for the reasons and upon the grounds that (a) there is no evidence to support it and (b) it is not relevant to any issue involved in this proceeding.

VI.

Plaintiff also objects to that portion of proposed Finding XVI, commencing with the words "For instance" in line 1 on page 8, through the balance of said Finding for the reasons and upon the grounds that (a) there is no evidence to support it

and (b) it is not relevant to any issue involved in this proceeding.

VII.

Plaintiff objects to proposed Finding XVII for the reasons and upon the grounds that (a) the May 4, 1942, contract is not ambiguous; (b) the contract speaks for itself; (c) parol evidence of the parties to the contract is not admissible in this proceeding to construe the contract as between plaintiff and defendant herein, and (d) if proper at all it is as a Conclusion of Law and it is not a proper subject for a Finding of Fact.

VIII.

Plaintiff objects to proposed Finding XVIII for the reasons and upon the grounds that (a) the May 4, 1942, contract is not ambiguous; (b) the contract speaks for itself; (c) parol evidence of the parties to the contract is not admissible in this proceeding to construe the contract as between plaintiff and defendant herein, and (d) if proper at all it is as a Conclusion of Law and it is not a proper subject for a Finding of Fact.

IX.

Plaintiff objects to the first paragraph of proposed Finding XIX for the reasons and upon the grounds that (a) there is no evidence to support it and (b) it is contrary to the uncontradicted evidence.

X.

Plaintiff objects to proposed Finding XX for the

reasons and upon the grounds (a) it is not relevant to any issue involved in this proceeding; (b) in any event it is not supported by the evidence, and (c) if proper at all it is as a Conclusion of Law and it is not a proper subject for a Finding of Fact.

XI.

Plaintiff objects to proposed Finding XXI for the reasons and upon the grounds that (a) it is contrary to the uncontradicted evidence and (b) if proper at all it is as a Conclusion of Law and it is not a proper subject for a Finding of Fact.

XII.

Plaintiff objects to proposed Finding XXII for the reasons and upon the grounds (a) it is not relevant to any issue involved in this proceeding and (b) in any event it is not supported by the evidence.

XIII.

Plaintiff objects to proposed Finding XXIII for the reasons and upon the grounds that (a) to the extent that it attempts to add to the agreed facts and the uncontroverted evidence it is not supported by the evidence; (b) if proper at all it is as a Conclusion of Law and it is not a proper subject for a Finding of Fact, and (c) under the agreed and uncontradicted facts estoppel is not available to defendant as a defense and in any event the elements necessary to establish an estoppel as set forth in *Bennett vs. City of Salem*, 192 Or. 531 are not present in this action.

XIV.

Plaintiff objects to the proposed Finding XXIV for the reasons and upon the grounds that (a) there is no evidence to support it; (b) it is contrary to the uncontradicted evidence, and (c) under the uncontradicted evidence neither estoppel nor consent are available to the defendant as defenses in this action.

XV.

Plaintiff objects to the proposed Finding XXV for the reasons and upon the grounds that (a) it is not supported by the uncontradicted evidence; (b) it is not a statement or finding of the ultimate facts in issue in this proceeding; (c) under the admitted facts and circumstances of this action no such Finding or Conclusion can be made, and the good faith of defendant or its predecessor is not an issue in accordance with the applicable law which is established by *Hughes vs. Heppner Lumber Company*, 205 Or. 11; *Kergil vs. Central Oregon Fir Supply Company*, 66 Or. Adv. Shs. 651.

XVI.

Plaintiff objects to all of proposed Finding XXVI, except the first sentence thereof for the reasons and upon the grounds that (a) it is contrary to the uncontradicted evidence in the case; (b) it states a conclusion of law and; (c) it is directly contrary to the treble damage statute Ors. Section 105.810, property interpreted as applied to the uncontradicted evidence.

XVII.

Plaintiff objects to all of proposed Finding XXVII, for the reasons and upon the grounds that (a) there is no evidence to support it; (b) it is contrary to the uncontradicted evidence; (c) it is irrelevant to any issue involved in this proceeding, and (d) if proper at all it is as a Conclusion of Law and it is not a proper subject for a Finding of Fact.

Conclusions of Law

I.

Plaintiff objects to proposed Conclusion of Law I for the reasons and upon the grounds that (a) it is not a proper Conclusion from the relevant admissible facts which were introduced in this proceeding; (b) it is contrary to the law applicable to this proceeding and to the Oregon Treble Damage Statute which is applicable in this action.

II.

Plaintiff objects to proposed Conclusions of Law II and III for the reasons and upon the grounds that (a) they are not proper Conclusions from the relevant admissible facts which were introduced in this proceeding; (b) they are contrary to the law applicable to this action as established by *Hughes vs. Heppner Lumber Company*, 205 Or. 11; (c) the May 4, 1942, contract involved is not ambiguous and defendant and its predecessor acquired only the timber which was merchantable on the date of the contract which, under the undisputed evidence,

was then 5,000,000 board feet, and defendant and its predecessor without legal right or authority removed over 4,000,000 feet of timber (in addition to the 5,000,000 feet bought and sold pursuant to the contract) which was not merchantable on May 4, 1952; (d) under the agreed and uncontroverted facts plaintiff is entitled to a judgment as a matter of law for the timber which was removed by defendant and its predecessor after January 1, 1953, the amount of which was stipulated between the parties at the stumpage prices which were agreed upon between the parties.

III.

Plaintiff objects to proposed Conclusions of Law IV for the reasons and upon the grounds that neither estoppel nor consent are available to defendant in this proceeding on the basis of the agreed and uncontradicted facts as is established by *Hughes vs. Heppner Lumber Company*, 205 Or. 11.

IV.

Plaintiff objects to proposed Conclusion of Law V for the reasons and upon the grounds that based upon the agreed and uncontroverted facts in this action, and applying the law established by *Hughes vs. Heppner Lumber Company*, 205 Or. 11, and *Kergil vs. Central Oregon Fir Supply Company*, 66 Or. Adv. Shs. 651, defendant and its predecessor abandoned that merchantable timber, if any, which remained on the land involved prior to January 1, 1953, and plaintiff is entitled to recover from defendant for the agreed amount of timber that was

removed after January 1, 1953, at the prices agreed to between the parties.

Judgment

I.

Plaintiff objects to the proposed Judgment because under the agreed and uncontroverted facts and the law applicable to this action,

(1) Plaintiff is entitled to recover a judgment against defendant for three times the value of the stipulated quantity of timber which was removed after January 1, 1953, at the stumpage prices stipulated between the parties; and

(2) Plaintiff is entitled to recover treble damages for the cedar which was removed by defendant and its predecessor and not double damages.

BAILEY, HOFFMAN &
SPENCER,

/s/ LEWIS HOFFMAN.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,
Attorneys for Plaintiff.

Service of Copy acknowledged.

[Endorsed]: Filed June 19, 1958.

was then 5,000,000 board feet, and defendant and its predecessor without legal right or authority removed over 4,000,000 feet of timber (in addition to the 5,000,000 feet bought and sold pursuant to the contract) which was not merchantable on May 4, 1952; (d) under the agreed and uncontroverted facts plaintiff is entitled to a judgment as a matter of law for the timber which was removed by defendant and its predecessor after January 1, 1953, the amount of which was stipulated between the parties at the stumpage prices which were agreed upon between the parties.

III.

Plaintiff objects to proposed Conclusions of Law IV for the reasons and upon the grounds that neither estoppel nor consent are available to defendant in this proceeding on the basis of the agreed and uncontradicted facts as is established by *Hughes vs. Heppner Lumber Company*, 205 Or. 11.

IV.

Plaintiff objects to proposed Conclusion of Law V for the reasons and upon the grounds that based upon the agreed and uncontroverted facts in this action, and applying the law established by *Hughes vs. Heppner Lumber Company*, 205 Or. 11, and *Kergil vs. Central Oregon Fir Supply Company*, 66 Or. Adv. Shs. 651, defendant and its predecessor abandoned that merchantable timber, if any, which remained on the land involved prior to January 1, 1953, and plaintiff is entitled to recover from defendant for the agreed amount of timber that was

removed after January 1, 1953, at the prices agreed to between the parties.

Judgment

I.

Plaintiff objects to the proposed Judgment because under the agreed and uncontroverted facts and the law applicable to this action,

(1) Plaintiff is entitled to recover a judgment against defendant for three times the value of the stipulated quantity of timber which was removed after January 1, 1953, at the stumpage prices stipulated between the parties; and

(2) Plaintiff is entitled to recover treble damages for the cedar which was removed by defendant and its predecessor and not double damages.

BAILEY, HOFFMAN &
SPENCER,

/s/ LEWIS HOFFMAN.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,
Attorneys for Plaintiff.

Service of Copy acknowledged.

[Endorsed]: Filed June 19, 1958.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTION TO CONCLUSION
OF LAW VI AND TO THE PROPOSED
JUDGMENT ORDER DECLARING DE-
FENDANT TO BE THE PREVAILING
PARTY AND AWARDING IT COSTS

Comes now plaintiff and makes and files the following objection to defendant's proposed Conclusion of Law VI and to the proposed judgment order declaring defendant to be the prevailing party herein and awarding it costs herein for the reasons and upon the grounds:

(1) Under the Court's opinion plaintiff has been awarded judgment against defendant and no counterclaim was asserted by defendant, and plaintiff, therefore, is the prevailing party herein and is entitled to costs as of course under Rule 54(d) of the Federal Rules of Civil Procedure.

(2) In any event no circumstances exist in this action warranting the Court's exercise of its discretion to deny costs to plaintiff as the prevailing party and to award costs to defendant.

In support of these objections plaintiff relies upon Rule 54(d) of the Federal Rules of Civil Procedure; 10 Cyclopedia of Federal Procedure, Third Edition, Pages 351 to 354, Section 38.05; 6 Moore's Federal Practice, Second Edition, Pages 1305, 1306 and 1308, Paragraph 54.70(4) and (5).

BAILEY, HOFFMAN &
SPENCER,

/s/ LEWIS HOFFMAN.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,
Attorneys for Plaintiff.

Service of Copy acknowledged.

[Endorsed]: Filed July 16, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on regularly for trial before the undersigned, a judge of this court, sitting at Eugene, Oregon, on the 14th day of May, 1958. Plaintiff appeared in person and by James C. Dezendorf and Lewis Hoffman, his attorneys. Defendant appeared by Hugh L. Biggs, Robert H. Huntington and Donald R. Husband, its attorneys.

The parties, having waived trial by jury, thereupon offered testimony and evidence in support of their respective contentions and rested. The court, having considered all matters of fact and law arising on the pretrial order and presented by the parties and now being fully advised, makes the following

Findings of Fact

The parties stipulated certain facts which were set forth in the pretrial order as Agreed Facts.

They are adopted and set forth herein immediately following as part of the court's findings, being paragraph numbers I to XI, inclusive.

I.

Plaintiff is a citizen of the State of Oregon, and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

On May 4, 1942, Marvin T. Warlick and Thelma G. Warlick, husband and wife, were the owners of the following-described real property, to wit:

The Southeast quarter, the Southeast quarter of the Northeast quarter, and the Southeast quarter of the Southwest quarter and Lot 4, of Section 31, Township 18 South, Range 9 West, of the Willamette Meridian.

Lots 3, 4, 6 and 7 and the East half of the Northwest quarter of the Southeast quarter, and the East half of the West half of the Northwest quarter of the Southeast quarter of Section 6, Township 19 South, Range 9 West, of the Willamette Meridian. Lot 1 of Section 1, Township 19 South, Range 10 West, of the Willamette Meridian, all in Lane County, Oregon.

together with all trees and timber thereon.

III.

On the 5th day of May, 1942, said Warlicks entered into a timber sales agreement with Siuslaw

Forest Products, Inc., by the terms of which the Warlicks agreed, among other things, to sell to Siuslaw and Siuslaw agreed to purchase and remove "all of the merchantable old growth and second growth fir and hemlock timber either standing or down and now growing or located" upon the real property above described, which said agreement also provided as follows:

"It is expressly understood that the Vendee (Siuslaw) shall have twenty (20) years from the date hereof within which to commence the cutting and removal of said timber and such not to exceed five years, additional time as may be reasonably necessary to complete the cutting and removal of the timber sold and purchased hereunder, all provided that the initial operation of cutting and removal shall be commenced within twenty years from the date hereof."

That Siuslaw should pay "any and all taxes and fire patrol assessments or other assessments if any there be, lawfully levied and assessed against said timber (exclusive of the land) commencing with the 1942-1943 taxes throughout the life of this agreement and until the timber purchased and sold hereunder shall have been cut and removed or the same abandoned by the Vendee (Siuslaw)."

IV.

On October 29, 1942, the Warlicks conveyed to

G. E. Tucker and Marilla W. Tucker, husband and wife, and S. W. Tucker and Dorothy S. Tucker, husband and wife, the real property described above, except for the timber upon the premises theretofore sold by grantors (Warlicks) under that certain contract recorded at Volume 232, Page 615, Lane County, Oregon, deed records.

V.

On the 14th day of July, 1952, the Tuckers, referred to in paragraph IV, entered into a contract with the plaintiff, wherein the Tuckers agreed to sell and plaintiff agreed to buy all of the Tuckers' interest in the real property above described except for the timber upon the premises theretofore sold by the grantors under that certain contract recorded at Volume 232, Page 615, Lane County, Oregon, deed records. Subsequently, pursuant to the terms of the said contract, the Tuckers conveyed to plaintiff the real property above described, except for the timber upon the premises theretofore sold by the grantors under that certain contract recorded at Volume 232, Page 615, Lane County, Oregon, deed records.

VI.

On the 1st day of May, 1953, defendant United States Plywood Corporation acquired all of the assets and assumed all of the liabilities of Siuslaw Forest Products, Inc., and thereafter caused Siuslaw to be dissolved.

VII.

On November 16, 1956, the Tuckers executed and delivered to plaintiff a document entitled "Assign-

ment," wherein the Tuckers undertook to assign all their right, title and interest in and to any and all claims they then had or in the past had had against Siuslaw Forest Products, Inc., and/or defendant arising from or in any way connected with the timber or timber rights located on the real property above described, or in any way connected therewith from the date the Tuckers acquired the right to possession of said real property and the timber thereon to the date that they sold it to plaintiff.

VIII.

Defendant paid certain taxes and assessments on the timber located on the real property above described.

IX.

In the year 1949 defendant's predecessor, Siuslaw Forest Products, Inc., commenced logging operations on the real property above described. Thereafter said logging operations were carried on from time to time by said Siuslaw Forest Products, Inc., and/or defendant until the year 1956. During the period between 1949 and 1956, defendant and its predecessor, Siuslaw Forest Products, Inc., cut and removed the following species and quantity of timber from the said real property:

Description	M Board Feet
Old growth Douglas fir	6,730
Second growth Douglas fir	4,156
Hemlock	591
Cedar	8
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Total	11,485

X.

Plaintiff and defendant entered into a certain logging contract dated August 10, 1955, pursuant to which plaintiff, as a logger for defendant, cut and removed 108 M board feet of the total timber described in paragraph IX above from portions of the real property above described and delivered the same to defendant. Some of the timber on the premises cut by plaintiff was not removed therefrom.

XI.

Plaintiff made no objection or remonstrance to defendant or its predecessor about the quantity, quality, size or species of the timber which they were cutting and removing from said premises until the spring of 1956.

The court finds from the evidence introduced on the trial the following additional facts:

~~_____~~

XI-A

It was stipulated at the trial that during the years involved the species of timber involved had the following stumpage values:

Description	1950	1951	1952	1953	1954	1955
Old growth Douglas fir.....	15	19	24	29	30	30
Second growth Douglas fir.....	5	9	14	19	24	25-30
Hemlock	1	2	3	4	5	5
Cedar	--	---	---	5	---	---

XII.

The land upon which the timber in question was situated (hereinafter referred to as the Seaver

tract) is in the Coastal Range near the community of Mapleton in Lane County, Oregon. The predominant species and grades of timber in that area were those described in the contract of May 4, 1942. At that time and for years prior thereto, it was the prevailing custom and practice in the area to purchase timber by the stand rather than by individual trees.

XIII.

In 1942 and subsequent years, including the period during which defendant and Siuslaw cut and removed timber from the Seaver tract, customary logging practices in the fir and hemlock regions in western Oregon, including the Mapleton area, consisted of so-called high lead or donkey logging whereby specific stands being logged were logged clean, except of seed trees, in that individual trees within a particular stand which were not actually felled and bucked, were nevertheless knocked down or destroyed as a necessary incident of the logging operations. Good logging and forestry practices required that timber which was not removed from the logged area for use be burned as slash.

XIV.

In the Mapleton area, as well as other fir-growing areas, in 1942, old growth fir produced peeler logs which were then in increasing demand in the plywood industry as well as saw logs for which there was then and for many years prior thereto had been an active and ready market. Although old growth fir was in greater demand than second

growth fir, nevertheless a substantial and growing demand then existed in this area for second growth fir stands, second growth fir logs and second growth fir products, such as poles, piling and numerous manufactured products, including car decking, ties, bridge decking, studs, planks, siding and other lumber products for building and construction purposes.

Hemlock logs, in 1942 and in years prior and subsequent thereto, were being regularly sold primarily for pulp to paper manufacturers in the State of Oregon. In 1941 and 1942 Siuslaw was engaged in logging hemlock timber on other tracts in the general vicinity of the Seaver tract and selling it for pulp to Crown Zellerbach, a paper manufacturing company.

XV.

The Seaver tract in 1942 was inaccessible for immediate logging in that it was located in a rugged and rough area into which no logging roads had been constructed. The Warlicks had purchased the tract in 1935 for use as a family recreational retreat. Mr. Warlick negotiated the contract with Siuslaw for the purpose of converting into cash the value of the timber. It was Warlick's desire that the timber not be severed and removed immediately. Warlick sought out Siuslaw as a likely purchaser of the timber because Siuslaw had acquired substantial blocks of timber in adjacent areas, some of which were directly contiguous to the Seaver tract.

XVI.

At the time the parties were negotiating the timber purchase contract, Siuslaw was planning a multipurpose logging program for the utilization of its timber in the Mapleton area, not merely for saw logs but also for poles, piling, bridge decking, ties, pulp and other lumber products. It had embarked upon the construction of a logging road toward and into part of its lands adjacent to the Seaver tract. It was completing construction of a lumber mill at Mapleton for the purpose of sawing and processing logs from its timber in that area and it was interested in acquiring lands contiguous to its other holdings.

In May of 1942 and immediately prior thereto during the negotiations between Siuslaw and Warlick for the purchase of the timber on the Seaver tract, the parties did not know when the tract would become operable because of many factors then undetermined. For instance, they did not know when the logging road would be extended to the Seaver tract or precisely in what manner or at what time the tract would be logged. These factors would be governed by future development of Siuslaw's overall logging program. In view of these uncertainties and of Warlick's willingness that the commencement of the logging be delayed, they agreed on a relatively long period of time, that is, a total period of twenty-five years, within which Siuslaw might cut and remove the timber from the tract.

XVII.

The Tuckers, who purchased the fee from Warlick, and plaintiff, who purchased the fee from the Tuckers, at all times knew of the original intention of the parties with respect to the grades, species and quantity of timber conveyed, and neither the Tuckers nor the plaintiff believed that their respective deeds to the fee vested in them any rights in any of the fir and hemlock which defendant or Siuslaw desired to remove from the tract.

XVIII.

The first logging on the Seaver tract was done in 1949. Logging continued each year thereafter until the end of the year 1955. More than half of the total amount of the timber described in Finding No. IX was removed during the years 1949 and 1950. Only a small area was logged in 1951. In 1952 timber was felled, bucked and cold decked but was not removed therefrom until the following year. Major logging on this tract was carried on during the years 1953 and 1955. In 1954 a general strike in the logging industry caused a shutdown of the defendant's logging activities in the area with the result that a relatively small quantity of timber on the Seaver tract was logged during the year.

XIX.

The parties stipulated at the trial, and the court finds in accordance therewith, that excluding any timber removed from the property by the plaintiff in 1955 pursuant to his logging contract with defendant, the following species and quantities were

removed by defendant or Siuslaw between January 1, 1953, and December 30, 1955:

Species	M Board Feet
Old growth fir	850
Second growth fir	3,125
Hemlock	431
Cedar	8
<hr/>	
Total	4,414

XX.

The Seaver tract was logged as a part of Siuslaw's and defendant's entire holdings in the Mapleton area at all times in a manner consistent with defendant's and Siuslaw's mill inventory requirements and other practical considerations, including the development of a main logging road and spur logging roads. Interruptions in the logging of the Seaver tract were not intended to and did not operate as a relinquishment or abandonment by defendant or Siuslaw of any of the timber thereon.

XXI.

According to the prevailing standards of merchantability in the area, all of the fir and hemlock timber removed by defendant and Siuslaw as above stated was in fact merchantable on May 4, 1942.

XXII.

Both plaintiff and the Tuckers, during the respective periods each owned the fee, requested and received reimbursement from defendant or Siuslaw

of fire patrol assessments and that portion of the real property taxes allocable to the timber.

XXIII.

During the entire period that defendant and Siuslaw conducted logging operations upon the Seaver tract, plaintiff lived in close proximity to the tract and was personally familiar with the nature and extent of logging operations being conducted thereon. From the time in 1952 when plaintiff first acquired his interest in this tract until the filing of this action in 1956 plaintiff did not have any objection to the severance and removal by defendant and Siuslaw of the fir and hemlock timber for which plaintiff seeks damages in this action.

XXIV.

The conduct of plaintiff and the Tuckers in requesting and obtaining reimbursement of property taxes allocable to the timber and fire patrol assessments, and in failing to protest or object to the cutting and removal of the timber during the course of the logging operations, evidences their knowledge of the intention of the original parties to the contract. Additionally, plaintiff, by entering into the logging contract referred to in paragraph X hereof and thereby agreeing that defendant was the owner of all the fir and hemlock timber on certain areas of the tract and by cutting and removing for defendant some 108,000 board feet of timber from the tract pursuant to said logging contract, evidenced not merely his consent to the

removal of that timber but also his understanding that all of the other fir and hemlock timber removed by defendant had been sold to Siuslaw pursuant to the terms of the contract of May 4, 1942, as understood and construed by the parties thereto.

XXV.

Neither defendant nor Siuslaw ever relinquished or abandoned any of its rights in or to any of the fir and hemlock timber which it acquired by the contract of May 4, 1942.

The logging affidavits filed in 1950 and 1951 by Frank McPherson logging superintendent for Siuslaw) with the Lane County Assessor stating that all of the merchantable fir and hemlock timber had been removed from a large segment of the Seaver tract, were intended by McPherson to reflect the status of the initial timber inventory in Siuslaw's timber depletion records. This initial inventory had been recorded without the benefit of a cruise or other accurate information as to volume and represented only an estimate of the amount of Siuslaw's timber holdings on the Seaver tract and surrounding and adjacent tracts.

When McPherson filed the logging affidavits, he had not personally inspected the entire Seaver tract, and was unaware of large tracts of remaining timber thereon in ravines and on ridge slopes into which spur logging roads had not yet been constructed. The terrain of these ravines and ridge slopes on which the remaining timber stood was

comparable to the terrain of other portions of the Seaver tract theretofore logged by Siuslaw. McPherson made and filed the affidavits in good faith without intending to mislead or deceive the County Assessor, and the record does not establish that the Assessor was in fact misled or deceived. On the other hand, defendant did pay taxes on the remaining timber after the McPherson affidavits were filed. McPherson was not an officer of Siuslaw or of defendant and was not authorized in preparing and filing the affidavits to relinquish, abandon or in any way prejudice his employer's title to any of the timber, and he did not intend to do so either by the filing of the logging affidavits or by his conduct in any other particular.

XXVI.

The 8,000 board feet of cedar referred to in paragraph IX hereof consisted of only five trees. It was not included in the contract of May 4, 1942, and defendant so admitted on the trial. The value of the cedar was stipulated by the parties to be \$5 per thousand board feet at the time of its severance, or a total of \$40. The circumstances surrounding the cutting and removal of the cedar do not evidence such intentional or wilful wrongdoing on the part of defendant as to justify treble damages.

XXVII.

Siuslaw and defendant, in all of their respective logging operations upon the Seaver tract, cut and removed the fir and hemlock timber therefrom in a

bona fide belief that they were the owners of such timber and were entitled to cut and remove the same from said tract under the terms of the contract of May 4, 1942.

From the foregoing findings of fact, the court draws the following

Conclusions of Law.

I.

The cutting and removal of the cedar timber was casual and involuntary, and plaintiff is entitled to judgment against defendant in the sum of \$80, being double the value thereof.

II.

Plaintiff's broad contention that none of the second growth fir and hemlock was conveyed by the contract of May 4, 1942, because no timber of these classes was merchantable on that date is untenable. The inclusion of these classes of timber in the contract establishes the parties' intention to convey timber of these classes in some quantity and of some degree of quality. The quantity and quality of the second growth fir and hemlock conveyed by the contract is to be measured together with the quantity and quality of the old growth fir timber by the term "merchantable." This term is to be construed in the light of the evidence showing the intention and understanding of the parties, the situation of the subject matter of the contract and of the parties themselves, and the meaning of

the term prevailing in the area. As so construed and applied to the facts of this case, all of the old growth and second growth fir and hemlock timber cut and removed from the Seaver tract by defendant and its predecessor was merchantable at the time of the execution of the contract.

III.

Defendant owned and was privileged to cut and remove all of the old growth and second growth fir and hemlock timber for which claim is made by plaintiff against defendant.

IV.

Plaintiff consented to the removal by defendant and Siuslaw of all of the fir and hemlock timber for which he claims damages in this action.

V.

Neither the defendant nor Siuslaw intended to or did relinquish or abandon any of its rights to the timber involved.

Done and dated this 16th day of July, 1958.

/s/ GUS J. SOLOMON,

United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed July 16, 1958.

United States District Court
For the District of Oregon

Civil No. 8695

JOHN N. SEAVER, JR.,

Plaintiff,

vs.

UNITED STATES PLYWOOD CORPORATION,
Defendant.

JUDGMENT ORDER

The court having heretofore made and entered its Findings of Fact and Conclusions of Law herein and the case now coming on for judgment in accordance therewith, now based thereon,

It Is Considered, Ordered and Adjudged that plaintiff have and he is hereby granted judgment against defendant for the sum of \$80. No costs.

Done and dated this 16 day of July, 1958.

/s/ GUS J. SOLOMON,

United States District Judge.

[Endorsed]: Filed July 16, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that John N. Seaver, the plaintiff above named, hereby appeals to the Court

of Appeals for the Ninth Circuit from the final judgment entered in this action on July 16, 1958.

BAILEY, HOFFMAN &
SPENCER,

/s/ LEWIS HOFFMAN.

KOERNER, YOUNG,
McCOLLOCH & DEZENDORF,
/s/ JAMES C. DEZENDORF,
Attorneys for Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed August 14, 1958.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We the undersigned jointly and severally acknowledge that we and our successors and assigns are bound to pay to United States Plywood Corporation, defendant, the sum of \$250.00.

The condition of this bond is that, whereas the plaintiff has appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed August 14, 1958, from the final judgment entered in this action on July 16, 1958, if the plaintiff shall pay all costs adjudged against him if the appeal is dismissed or the judgment affirmed, or such costs as

the Appellate Court may award if the judgment is modified, then this bond is to be void, but if the plaintiff fails to perform this condition, payment of the amount of this bond shall be due forthwith.

Dated at Portland, Oregon, this 14th day of August, 1958.

JOHN N. SEAVER, JR.,

By /s/ JAMES C. DEZENDORF,
One of His Attorneys.

GENERAL INSURANCE
COMPANY OF AMERICA,
Surety,

By /s/ C. HUNT LEWIS, JR.,
Attorney in Fact.

Countersigned at Portland, Oregon :

LEWIS & CARTWRIGHT,
INC.,

By /s/ D. M. DEAMOND,
Resident Agent.

[Endorsed]: Filed August 15, 1958.

United States District Court
District of Oregon
No. Civil 8695

JOHN N. SEAVER, JR.,

Plaintiff,

vs.

UNITED STATES PLYWOOD CORPORA-
TION,

Defendant.

Before: Honorable Gus J. Solomon,
United States District Judge.

TRANSCRIPT OF PROCEEDINGS

Eugene, Oregon—May 14, 15 and 16, 1958.

Appearances:

Messrs. JAMES C. DEZENDORF and
LEWIS G. HOFFMAN,
Attorneys for Plaintiff.

Messrs. HUGH L. BIGGS,
ROBERT H. HUNTINGTON and
DONALD R. HUSBAND,
Attorneys for Defendant.

(Whereupon the following proceedings were
had:)

Afternoon Session

(At 2:00 o'clock p.m. the following matter
came on for hearing:)

The Court: All right. I understood you were going to make some statements first.

Mr. Dezendorf: Yes, your Honor. From the standpoint of the plaintiff I think it might be helpful for us to give you a short statement as to what we expect to prove and what our contentions are with respect to the law.

We expect the evidence to show that negotiations between Mr. Warlick, who was the original owner of the property involved, and Mr. Davidson, who was the principal in Siuslaw Forest Products, commenced in 1941 and the contract was executed finally in May of 1942, which is the first exhibit in the case.

The provisions of the contract which are material are quoted in the admitted facts in the pretrial order, so that I don't need to refer to those beyond that at this moment.

Secondly, \$7,000 was the consideration that was paid by Davidson to Warlick. And we expect the evidence to show that the parties discussed and believed that they were dealing concerning 5,000,000 feet of merchantable timber.

Thirdly, the evidence will show that in one of the admitted exhibits that Siuslaw timber inventory and depletion [2*] records were set up in 1945 and just slightly less than 5,000,000 feet of timber was stated to be on the property involved.

The Court: What kind of records?

Mr. Dezendorf: They are timber inventory and depletion records which were set up in 1945.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

The Court: What does that mean? What does that show?

Mr. Dezendorf: It shows actually 4,882,000 feet of timber on the property involved.

The Court: No. What is the evidentiary significance of that inventory and depletion record?

Mr. Dezendorf: It is what they thought was on the property that they had bought from Mr. Warlick. And it showed as they logged it—they would deplete until they finally had it all depleted at the end of their fiscal year, April 30th, 1951.

Now, logging commenced on the property in 1949 and was completed some time in 1950, by which time 6,000,000 feet-plus of timber had been removed.

The Court: When did the logging start?

Mr. Dezendorf: '49 through '50, by which time over 6,000,000 feet had been removed. And on their timber depletion records they showed the timber completely depleted and they then filed complete timber removal affidavits with the Assessor of Lane County. [3]

The Court: That's in 1950?

Mr. Dezendorf: At the end of 1950, right.

Now, U. S. Plywood apparently acquired the stock of Siuslaw and Siuslaw was dissolved in 1953. Its assets were distributed to U. S. Plywood. Logging again was commenced on the land in that year of 1953 and 3,944,000 feet principally of second-growth fir was cut, and again in 1955 another 488,000 of second-growth fir was cut.

The Court: Now, they started again in '53?

Mr. Dezendorf: Right.

The Court: And they took off how much?

Mr. Dezendorf: 3,944,000 feet principally of second-growth fir. There was some minor amount of old-growth.

The Court: And in 1954 how much did they take off?

Mr. Dezendorf: None.

The Court: Oh. I thought you said you had some——

Mr. Dezendorf: In 1955 they took another 488,000 feet of second-growth fir.

The Court: All right.

Mr. Dezendorf: Now, it is what was cut and removed in 1953 and 1955 that we are complaining about in this proceeding. In all, defendant and its predecessor took over twice as much timber from the land as Warlick and Davidson bargained for in 1942. [4]

The Court: Is that unusual?

Mr. Dezendorf: It is where you buy merchantable timber. Now, there are four ways of buying and acquiring timber: The first is to buy the fee, in which event, of course, you get all that's on the land; the second is to buy all the timber and not the land; the third is to buy the merchantable timber, and not the land; the fourth is to buy timber above certain dimensions.

Now, it is not uncommon where you own all of the land or all of the timber to cut out more than you thought you had in the first place. But where you buy only the merchantable timber the merchant-

able timber and the timber that you buy is controlled as of the date of the contract and not what may become merchantable thereafter, is our theory of the law.

Now, as I said, I don't really believe there are going to be too many factual disputes in the case.

Our theory of the law is that, Number 1, this contract covers merchantable timber; it's not ambiguous. What was merchantable is a thing which has been defined by the Supreme Court, and it is known to Webster and other dictionaries. So that it's going to be the Court's duty in our view to rule what was merchantable within the meaning of the parties and we say that oral testimony as to what the parties may have meant will not be admissible. [5]

With respect to cedar, the evidence will show without any question from the admitted facts that they removed 8,000 feet of cedar timber which was not mentioned or covered by the contract at all.

The Court: When was that taken off?

Mr. Dezendorf: In 1953 after a timber removal affidavit had been filed on the property. And it was just taken is all and it wasn't covered by the contract in any way.

The Court: When did you file your original complaint in the case?

Mr. Dezendorf: On June 24th, 1956.

The Court: Original complaint, June 24th, 1956?

Mr. Dezendorf: Right.

The Court: When did you say the cedar was taken off?

Mr. Dezendorf: In 1953.

The Court: You don't know the date?

Mr. Dezendorf: The exact date we do not know.

I don't think anyone does.

The Court: What is the statute on that?

Mr. Dezendorf: Six years.

The Court: Six years?

Mr. Dezendorf: Yes.

The Court: For a penalty?

Mr. Dezendorf: Yes; we contend that. Apparently Counsel contends otherwise, but the Supreme Court of Oregon has ruled [6] on it.

The Court: In what case? I didn't look at the briefs. Is it in your brief?

Mr. Dezendorf: It is.

The Court: Well, I will find it, then, after awhile.

Mr. Dezendorf: Yes. It's *Kinzua Lumber Company vs. Daggett*, 203 Ore. 585.

The Court: All right.

Mr. Dezendorf: Now, Counsel apparently in his contentions, at least, makes a point that the statute runs from the date of the filing of the amended complaint, which was in November of '56 instead of June of '56. We, of course, rely on 49(c) of the Federal Rules of Civil Procedure and the other authorities which are cited in our brief.

As far as we can find, this started out as a timber trespass action for treble damages and it has never changed. We see no possible contention that can be made that there is any reason why the

statute should apply from the amended complaint in the original and, in any event, since we are only complaining about the timber that was removed in '53 and '55 I don't know whether it's going to make too much difference.

Now, Counsel contends that we have acquired nothing by virtue of the assignment from the Tuckers to Mr. Seaver, the plaintiff. We believe the law to be that a cause of action for trespass upon land and timber is assignable and we [7] have set forth in our brief the authorities.

The Court: I don't get this theory. After the Tuckers conveyed the land to the plaintiff?

Mr. Dezendorf: Right.

The Court: Some time after they assigned their rights to cause of action against the defendant to the——

Mr. Dezendorf: Mr. Seaver. That's right.

The Court: Yes. I don't understand. Did he reserve or under the law did Tucker have a claim for the timber, having already divested himself of the fee?

Mr. Dezendorf: If the defendant or its predecessor removed timber to which they were not entitled during the time that the Tuckers owned the property, they would have the cause of action.

The Court: Oh. Yes. That's right.

Mr. Dezendorf: So that we were in this case——

The Court: When did the Tuckers convey?

Mr. Dezendorf: In 1952.

The Court: But you are not asking for anything that occurred in 1952 or previous?

Mr. Dezendorf: No. But, of course, we didn't know until the timber cruise was actually completed just about a month or so ago exactly when this timber was removed. So that we were trying to protect ourselves all the way along to get all the rights that we could. [8]

The Court: So, actually, the assignment is meaningless in this case.

Mr. Dezendorf: Well, I am not sure that it is.

The Court: Well, I was trying to find out your position. You told me earlier that you were only claiming for the timber that was taken off in 1953 and 1955. You have also told me——

Mr. Dezendorf: What we are asking——

The Court: ——that the Tuckers conveyed all of their interest in the property to the plaintiff in 1952.

Mr. Dezendorf: Here is what we really claim——perhaps I oversimplified it—we claim that the defendant or its predecessor wrongfully removed any timber which it took from the premises after June 24, 1950. At present we expect our evidence to show that the only timber that we can tie down as having been removed thereafter was removed in 1953 and 1955.

Now, if it should develop during the course of the trial that there was timber taken after June 24, 1950, and before '53, we are going to claim the benefit of that. Now, does that straighten myself out?

The Court: Yes.

Mr. Dezendorf: That's the point we are trying

to make. So that perhaps the assignment is material.

The Court: Well, don't you run into the rule of specificity as far as the pretrial order is concerned in order to make that contention—— [9]

Mr. Dezendorf: Well——

The Court: ——under our local rules?

Mr. Dezendorf: I think I have a contention for everything that was removed after June 24, 1950.

The Court: All right.

Mr. Dezendorf: And I am talking now about what we expect our proof to be.

Now, the next defense that we know about is one where the defendant claims that the plaintiff is estopped from making any claim herein because as of August 19th, 1955—although the evidence will show that it was actually signed in December of 1955—Mr. Seaver entered into a contract with the defendant to remove logs from the extreme south-easterly corner of his piece of property and to deliver them to the defendant.

The Court: Now, I want to get that straight. I have talked to you about that before. Mr. Seaver owned the fee on certain property on which U. S. Plywood has been removing timber.

Mr. Dezendorf: Right.

The Court: Was Mr. Seaver hired by U. S. Plywood to log timber on his own land which U. S. Plywood claimed?

Mr. Dezendorf: Well, he entered into a contract in December of 1955, dated August 19th, 1955, to

remove timber from the extreme southeasterly portion of his tract. [10]

The Court: Well, that wouldn't really make any difference whether it was right in the center of his tract or in the extreme northerly position as part of it, would it? He did remove, he did enter into a contract. Now, why do you say he was not estopped? You told me once before, but I just didn't follow it.

Mr. Dezendorf: There are two reasons: Number 1, Mr. Seaver did not find out that he had a claim against the defendants for removing timber from his property until the spring of 1956, which was after all of the operative facts which are involved in this action had occurred. In order to estop Mr. Seaver the proof would have to show he in some way made a false representation to the defendant that he intended that they should act or change their position based upon his false representation; that they were ignorant of the truth; that they relied upon his false representation and changed their position, to their damage.

Now, we say that there isn't any possibility in the world of the defendant being able to establish that because Mr. Seaver didn't know what his rights were until after all of the operative facts had occurred; therefore, how could he mislead or challenge the defendant into acting upon a false representation that he made in changing his position to his detriment so that a basis for estoppel could exist?

Now, secondly—and I don't as yet have [11]

these cases in the memorandum, but I will give you a supplementary one—I find the law to be that conduct or representations subsequent to the acts of the party asserting the estoppel are legally insufficient because no reliance could have been placed upon them when the acts were committed, which is exactly this case.

The Court: Why?

Mr. Dezendorf: Because if the defendant wrongfully took timber, they took it before Mr. Seaver entered into the contract that they relied upon as an estoppel in December of 1955.

The Court: Well, wouldn't this be an estoppel to all timber removed to 1955 or, at least, the timber on that portion that he took?

Mr. Dezendorf: It could be. If so, it would only amount to 100,000 feet.

The Court: There was a representation, wasn't there, when Seaver said, "I will take the timber;" he says, "I will remove the timber that belongs to you"? He wouldn't go and say, "I will take my own timber." And there was this representation, and there might have been a mistake of law over there but certainly no mistake of fact. Because he is representing that "I am authorized to remove your timber." He wouldn't go and say, "I am going to take this timber and then I am going to sue you for treble damages even though I take it off your land." I mean, there is the misrepresentation. [12]

Mr. Dezendorf: If he had known that they had no right to take it, then I would say there could be an estoppel. He didn't know that they had no

right to take it at that time. And the Court may recall that in speaking about the matter in chambers to us the other day you were of the feeling offhand that, perhaps, an estoppel would apply because Mr. Seaver would be charged with knowledge of whatever was of record.

But if Mr. Seaver is charged with knowledge of what is of record, so is the defendant.

The Court: Yes.

Mr. Dezendorf: It would work equally to each.

The Court: That is true.

Mr. Dezendorf: Therefore, the defendant could not claim any estoppel based upon some imputed knowledge to Mr. Seaver because it would be imputed just as well to them.

The Court: Of course, not very much knowledge could be imputed to each one of them because you didn't win that case until 1955 or '56. Isn't that right?

Mr. Dezendorf: My memory is 1955.

The Court: And the Hughes case came down about that time.

Mr. Dezendorf: That's correct. But I think that gives you a bird's-eye view of our belief as to how the facts will develop and as to how our position is on the law.

There is, perhaps, one thing I should mention before [13] sitting down. The last exhibit that we reserved was the Forest Service records, Mapleton. They are here, but the Government has asked us to photocopy and put photocopies in. So that photocopying is being done at the moment.

The Court: That's all right.

Mr. Biggs: If the Court please, Mr. Dezendorf has given you a very skeletonized view of the case as he sees it. If your Honor is disposed, I would like to make just a little fuller statement.

The Court: Yes, I am disposed.

Mr. Biggs: Thank you, your Honor. It will make the picture just a little fuller.

The facts, substantially, are these, your Honor: Starting, now, with the original parties to the contract, Mr. Marvin T. Warlick owned the Seaver tract prior to 1942. It was a remote area near Mapleton. He used it as a kind of a mountain retreat he had had for a number of years for his own recreation and for his family's recreation. He was a businessman.

Mr. Davidson had been in the logging business and lumbering business up in Washington for a good many years. He had most lately been engaged amongst other activities up there in the cutting of logs and piling and smaller timber which he was supplying to customers down in California.

The Court: Is Mr. Davidson going to be a witness in [14] this case—and Mr. Warlick?

Mr. Biggs: Yes, your Honor. They are both here. They are both living and both are here and both expect to testify. Both of them will be here as a witness for the defendant.

Mr. Davidson then came into this area and started acquiring timber with some men up in Washington, Mr. Ed Eisenhower and Mr. Gonyea. He acquired quite a large tract on contract called the McKenzie

River Tract in this general area which, as the various parcels began to be put together, reached to the Seaver Tract. We will call it the Warlick Tract. Mr. Warlick and Mr. Davidson became well acquainted and friendly. And in the next year or so Mr. Warlick decided he wanted to sell the timber off of that tract. There were some cleared areas on the tract. He was pasturing cattle on there at times and he felt that if he could realize some out of the timber he would like to do it.

They negotiated for some little time. Mr. Davidson wasn't ready to go in there yet to do the logging, didn't know when he would be able to get in there, because it was then not served by any logging roads or ways adequate for the purpose of taking out timber.

So there was no urgency about his acquiring it. But it was next to his property and he had some interest in it. I am sorry, your Honor—you started to say something?

The Court: No. [15]

Mr. Biggs: I see. So that in 1942 they came to an agreement. There is no dispute or misunderstanding between them at all. Both of these gentlemen, I anticipate, will testify in this court that it was the intention of the parties to convey all of the timber on the tract.

The Court: Why do they use the word "merchantable"?

Mr. Biggs: I don't think either one of them knows, your Honor. I think the contract was taken—one of them arranged to have it taken to an at-

torney. We haven't identified the attorney. We suspect it might have been Judge East, although neither of us have talked with Judge East about it. But I think it was a word that was——

The Court: I did. He doesn't remember.

Mr. Biggs: He doesn't remember. Well, then, we don't know who drew the contract.

The Court: He says he knows Mr. Gonyea and he has done some work for him, but he has no recollection of ever having prepared this contract.

Mr. Biggs: Well, that's entirely possible, your Honor. We are only conjecturing.

The Court: That's off the record, then. But that's my own investigation.

Mr. Biggs: My mind is put at rest, then, your Honor.

The Court: Now, what is that blank space in Paragraph 3 on Page 2? [16]

Mr. Biggs: Well, that isn't a blank space. We attempted to reproduce this typewriting because of what we then thought the plaintiff's theory of the case was going to be, exactly how the original contract was written after writing the line above and line below the phrase "not to exceed five years," was inserted after the word "necessary" so as to attempt to clarify the intent of the parties. When this case was originally filed the only claim made in June 24, '56, against the defendant was that they hadn't taken the logs off within the five years that it was then contended by the plaintiff was required under the contract. That was the lawsuit in the beginning and the only lawsuit.

So when this paragraph appeared in the agreed statement of facts I wanted it to show precisely how it was written into the contract. That's the only significance to it. The intention of the parties was so clear, your Honor, on the amount of the timber that was conveyed and sold and taken as to its comprehending the whole amount that Mr. Warlick will testify he went to Mr. Davidson after the contract—some time after the contract and said, "Well, Sherm, I have got a little fencing around here to do and I thought I might try to enlarge my barn. Would you have any objection if I took some of the smaller stuff off for that purpose?" And Sherm said, "Oh, no. Go ahead. Whatever little you take for farm purposes will never be missed." I say that just to show you how clearly the [17] parties were thinking that they had all of the timber—all of the timber had been conveyed to Davidson. I feel justified in making that statement in view of the holdings of our Supreme Court that the word "merchantable" in itself imports an ambiguity and requires the extrinsic evidence of the intention of the parties, which is the cardinal principle in determining how the contract should be construed.

Shortly after this view was made Mr. Warlick's private plans changed. He conveyed the fee to Mr. Tucker, who lived out in that area for \$4,000, or about \$4,000. Maybe it was \$4,500. So Mr. Tucker remained the owner of the fee and Siuslaw Forest Products, which was then incorporated, in the

meantime had taken the title to the timber; Mr. Tucker remained the owner of the timber. There is no difficulty between them during those early years or at any time.

In 1944 this company, which had constructed a mill at Mapleton——

The Court: Which company?

Mr. Biggs: The Siuslaw Forest Products Company had just constructed its mill in '41, just for the purpose of milling the stuff on the adjacent areas, the Indian Creek area, started developing a road up to the so-called Jump Creek Area. You will hear that referred to, Jump Creek, and the Hadsall area, which includes the Seaver tract. But it is greater than the Seaver tract. U. S. Plywood at that time had built a mill at [18] Mapleton and was interested in peeler logs primarily and entered into a contract with Siuslaw Forest Products to supply its mill with peeler logs. So that the Siuslaw Forest Products then came into ready money for the construction of their road and they started building their mainline road then, in '43 or '44, logging the areas nearby as they put their logging road through, and making the operating revenues pay the expenses of construction.

They reached the Seaver Tract—the road reached the Seaver Tract in 1948, the latter part of it, or the early part of '49. And, in addition to their logging of other areas in the Jump Creek Tract, they did take some timber off the Seaver Tract in 1949. But they kind of opened it up then to one

area to make it accessible, and in 1950 they started a real logging show on the Seaver Tract.

Now, your Honor, they still were a small company. I say this in anticipation of what Counsel is going to say, and so we will have a true picture. It was a small, growing company primarily engaged in logging and not bookkeeping. The records are not completely consistent. It wasn't until 1949 that Siuslaw even attempted to set up a timber inventory and that was because when the tax statements started coming in they just didn't know how to even check off against the tax statements the property which they owned.

One of the logging superintendents was called into [19] the office and attempted then to set up what they will refer to now as a timber depletion record by opening up or establishing an inventory—additional inventory of the timber that they owned.

He used all of the available information that was in the office. I should say that in 1944 U. S. Plywood acquired an interest in Siuslaw Forest Products but left the management to the local people. And Mr. Davidson had retired from the management. From abstracts of title and from cruises on some of the McKenzie River Tract property and various other sources he acquired information as to what the probable volume of all the timber was, and he started trying to break it down the best he could without the benefit of cruises into some allocable portion of the whole to a particular forty so that they would have a record to work against, knowing that his errors

would be compensating each other; if he assigned too much to one forty he would assign too little to the next forty. And as long as his overcut and undercut wasn't too far out of line it was a workable record to him and would make no ultimate difference in their income tax records.

They are not records that the company is proud of and, certainly, they are not records that are easy for anyone to work with. But they were the best that they had.

In 1950, then, still being considerably understaffed as far as office help is concerned, they put on a good logging [20] operation in the tract and had taken off a good deal of timber. By 1950 it's true that against this initial inventory that they had the logs that came off of that tract equaled or exceeded the initial inventory. So, they showed on their timber depletion record since the balance of timber depleted. That was the reference that Mr. Dezen-dorf made to it. Everything else that came off, then, of the Seaver Tract in the years following was shown as an overcut.

The Court: Let me ask you this: In 1951 did they take off any timber?

Mr. Biggs: Not in 1951.

The Court: Now, what timber did they come back and take off in 1953?

Mr. Biggs: In 1953—'52 they came back. Contrary to Counsel's statement I think our evidence will show——

The Court: All right.

Mr. Biggs: 1951 their mill inventories required

them to supply U. S. Plywood with more peelers and they went up into the McKenzie River Tract area and did no more logging on the Seaver Tract in that year. Now, this is a very rough area. In fact, we have got a stereoscopic map here that I want your Honor to see. It never had been cruised. The logging crew didn't even know what was on the Seaver Tract by cruise or actual count or actually getting around. That seems difficult to believe, your Honor, unless you actually see the steepness [21] of these ridges and ravines and how the timber was disposed on that. They had ended the timber operation up the end of one draw. What lay on the other side of a high ridge nobody actually knew and they didn't go out and actually cruise it. When they pulled out it was to go over to another area in which they were expecting to build up their inventory of peeler logs. And subsequently they returned to the Seaver Tract where they thought they had got most of the old growth. They were coming back, then, to get the second-growth and the stumps that remained on there.

The Court: Now, let me ask you this: Did they take off, say, a 40 clean and they were going back to remove the timber on another tract, another 40, or did they take off certain selected trees the first time off a 40 and come back to clean it up the second time?

Mr. Biggs: No. They didn't take selected trees off, your Honor, because the timber doesn't grow that way. They log by tracts always and they log it fairly clean by tracts. Even the small stuff that

they wouldn't take into the mills they would fell anyway. They had to because of the nature of their logging operation. And they took it clean as they went. But it wouldn't follow section lines because the contour didn't. It followed contour areas and that was misleading. They didn't know where the interior lines were of some of these 40's. They had the exterior lines marked so they wouldn't be [22] getting over on somebody's else's property, but within their own area they only guessed. When they could see a corner where they had been on one 40 they might file an affidavit that they had logged that 40 without, in fact, knowing that on the other side of the ravine there was just as much timber as had been taken off within the actual legal subdivision of that 40. That's where this—but maybe I can pause here for just a minute in view of your Honor's question which you raised.

In this country, which is very different from a pine country because of the way the fir grows, most of the logging is clean logging and not selective logging. The old-growth is quite generally found in a contiguous stand because the old-growth means it's a spot of timber that some of the earlier fires a couple of hundred years ago missed. So it remains old timber. New timber won't grow up in a stand of old-growth. The second-growth starts up in a burned-over area where they have a clean area to grow in and are not blotted—blighted out by the sunlight, although while generally that's the pattern, although there are areas within a 40 that are a mixture of second-growth and old-growth.

The Court: What is your explanation for this certificate of——

Mr. Biggs: Logging off?

The Court: Yes.

Mr. Biggs: That was precisely it. Mr. McPherson will [23] testify to that because he filed the affidavit of logging. It was filed merely through ignorance of what was actually there. If it was carelessness on his part, it was certainly not an intentional, wilful abandonment of the timber. And, short of that, of course, it has no materiality at all.

The Court: Well——

Mr. Biggs: He had no authority to do that.

The Court: ——in that Hughes case the Court did place quite a bit of credence—I think probably the explanation is that all these timber companies cheat the counties. Isn't that the ordinary thing to do? So they have been filing these affidavits for years. So I wanted to know how truthful your witnesses are going to be.

Mr. Biggs: Your Honor, I appreciate the frank statement. I think that there certainly was a custom among logging companies not to be too careful about that. There is another thing, too, your Honor, in those years. The Assessor didn't even have this property on his rolls as timber property. He didn't know what was out there. It had never been cruised and never, in fact outside of the information we furnished them with logging affidavits, never was known to him that it was in fact timberland. He got most of that information from us.

But I think that the loggers in the main felt it

was up to the—speaking generally now—Assessor to know—was to put his own value on it. In any event, this man, your Honor [24] —and I will submit his sincerity to you with my complete sincerity—was not an officer of the company. He never had been, and he wasn't a stockholder. He was out there getting logs rather than keeping records. And his bookkeeping and the book records were sloppy by standards of modern-day business. There is no disposition to dispute that at all.

Now, your Honor, they did come back in 1952. They didn't take timber into the mill in 1952, but they did log a good deal of the timber in 1952 and cold-decked it there for taking in at a later time. They built up their inventory on the property.

They logged in 1953. 1954 they did not log as much. They did some logging, but there was strike trouble and they were closed down a part of the time on that. 1955 they did some logging and were logging through Mr. Seaver as an independent contractor when this lawsuit was filed.

Now, our position is this, your Honor: That the intent of the parties being the governing one there is no dispute at all between the original parties as to what they intended. There is no question, I think, can't be any serious question that Tucker and Seaver both knew what the original parties intended. Tucker, according to Mr. Seaver's deposition, when he attempted to—when he sold Seaver the land and subsequently when he gave Seaver the assignment made no claim to owning any timber

or having any rights against [25] anyone because of the timber on the farm—on that tract. He made no charge for the assignment, didn't receive a dime of consideration for it. He just gave it to——

The Court: Is Tucker going to be here as a witness?

Mr. Biggs: I don't think that he is. We haven't called him. I have developed this information through Mr. Seaver himself on his deposition.

Tucker came in—after he had sold the farm to Seaver—for the first time so far as our records show, that we can find, that he had ever made any claim on us to pay taxes on the timber. In 1952 he did come in and he said—he was down in California much of that time—"Here, I have this contract and it provides for you to pay the timber taxes on it." And they figured up the taxes and paid them and there was no question about it. He took the——

The Court: They have been paying all the taxes ever since?

Mr. Biggs: They have been paying all the taxes on the timber that has been presented to them, and Seaver has been demanding taxes on the timber every year and has been receiving taxes on the timber. And the fire patrol——

The Court: Tell me that again.

Mr. Biggs: Seaver also has been demanding. He receives a tax statement. He brings it over to defendant and asks for defendant to allocate the part of the—— [26]

The Court: When was the last year he did that?

Mr. Biggs: 1956. Now, let me give you a little of Seaver's understanding of this, your Honor. He is a native in that community. He is a boy that grew up or has lived there a good part of his life on an adjoining tract. He had been over and familiar with this tract that Warlick owned and most of the time that Warlick was on it. He knew Warlick; he knew the timber. He knew when the original logging show started. As a matter of fact, I think he was employed by the Kontich Logging Company who took the first timber off this tract in 1949. He worked, if I recall his testimony——

The Court: Who took it?

Mr. Biggs: Kontich Logging Company, an independent logging company, a gyppo logger hired by Siuslaw, who was doing the logging during some of the years in '52, '53 or '54, or somewhere in there. Seaver was employed by them as a part of their crew to help them take timber off of this tract of land.

Now, your Honor, Counsel says that he didn't know what his rights were in this. I don't know that anybody can say from day to day what a Court might hold in a particular situation. I think that the case we are all talking about is readily distinguishable.

The Court: What case are we talking about?

Mr. Biggs: I mean the Hughes-Heppner case. I think it's readily distinguishable from this on the facts. And I think [27] the law is more helpful to us than them. We will discuss that when we get to it. The fact of the matter is——

The Court: I'd be interested in seeing that.

Mr. Biggs: The fact of the matter is——

The Court: Well, I wouldn't make that statement so far as Daugherty. I think there is some favorable language in there.

Mr. Biggs: Yes.

The Court: But I didn't think that the Hughes case helped you very much.

Mr. Biggs: Well, I think on the issue that merchantability is a question of fact, your Honor——

The Court: Yes.

Mr. Biggs: I think—Seaver from the moment he bought the property or the same year that he bought—that he had a contract to buy it, before he even got the deed—he got the contract in '52 and before he got his deed in '54 had consulted an attorney about rights under that contract. We have a letter the evidence will show is a demand written by Mr. Hoffman to either U. S. Plywood or Siuslaw—I don't know whether it was just before or after that merger—saying, “Mr. Seaver has submitted to me his contract which I have examined. I find no rights under that contract for you to haul timber from your adjoining tracts across my tract on your logging road. You can only take off over that road [28] timber from my tract,” making no reference to the fact that they were cutting stuff that he thought—now was claiming was unmerchantable or objecting in any way. In 1952, prior to the start of this lawsuit and after practically all of this timber had been cut, he again wrote to U. S. Plywood through his attorney, Mr.

Hoffman, again making a claim but not any claim that the timber removed was unmerchantable, at that time saying, "Here you have been logging on here for more than five years and the contract provided that you should have only been on here five years. Your time is up and, therefore, you are a trespasser and I am going to bring an action against you."

In the summer, August or December of 1955, whenever it was that he applied to U. S. Plywood for a logging contract to take off some of this very same timber that he is now talking about, the contract itself recited that U. S. Plywood was the owner of all the timber on the Seaver Tract and there was never any dispute at any time that the contrary was so.

We think those facts, your Honor, not only establish an estoppel; we think stronger than that: They establish a consent to our going on the property and taking the trees.

Now, the importance of that, of course, is to convert whatever rights he should have to—we deny that he has any because we deny there has been any breach of the contract or we deny that there has been anything taken off that property [29] that we weren't entitled to take off by the contract. But an objection to any part of the timber, cedar or anything else, is met by a consent on the part of the plaintiff here to our going on the property.

He was there every day, saw us go on. He saw what we were doing, he made no objections, he didn't protest at all. He asked us to pay——

The Court: Asked you to——

Mr. Biggs: To pay timber taxes. Everything he did was implied to represent——

The Court: But does that refer only to the 100,000 feet?

Mr. Biggs: No, your Honor. That refers to everything that came off since 1949. We don't yet know what Counsel claims, whether his theory is that regardless of the quality and size and specie of timber we are estopped or we must be held to have given up our interest in it by the logging affidavits that we filed, whether that's his theory and, therefore, everything that came off after that time was unlawfully taken off because we had abandoned it, or whether he says that the trees that we were cutting off after that time were too small to be merchantable, or whether he says that none of this timber was salable or of any value in 1942. We have never yet heard from Counsel just precisely what he contends in that connection.

But if it is that we had abandoned the timber our [30] position is, No, we did not. You can't abandon nor relinquish a fee or a title—an interest in real property without a formal conveyancing and without an intent and, in this case, without a corporate intent. This man wasn't an officer of the company and had no authority to abandon or relinquish or give up any of the company's rights. So that if his contention is abandonment we don't see how the facts or the law can either sustain him. If the question is merchantability, the evidence will show that second-growth and

old-growth and all of the size and quality and quantity that we took off of that property was merchantable and was actually being manufactured in commercial operations and log manufacture——

The Court: When did the great increase in stumpage take place?

Mr. Biggs: I think it started——

Mr. Dezendorf: After 1950.

The Court: 1950?

Mr. Dezendorf: After 1950.

Mr. Biggs: Probably gradual from about 1950 on, your Honor. There is no question about it. There was a rise in the price.

The Court: That which was unmerchantable before and uneconomic to remove before became merchantable and——

Mr. Biggs: I would say uneconomic. Yes. I think some old-growth or second-growth in areas all over the state were [31] not economic to remove in 1942 and were economic to remove in 1950. I don't think there is any question about that.

The Court: This spread wasn't that long, '42 to '50. How about '48 to '50?

Mr. Biggs: '48 to '50? There was an increase in price, wasn't there, between '42 and '48 during the war years? I can't tell you just what that is. There certainly was, yes, your Honor.

The Court: All right.

Mr. Biggs: It wasn't as much as that. So that our position is that the whole thing being merchantable was conveyed because the parties intended by the meaning of the word "merchantabil-

ity'' in view of their circumstances and of their purposes and all of the surrounding——

The Court: You didn't ask for reformation of the contract?

Mr. Biggs: No, we did not, your Honor, because—I don't know that it's inappropriate. The only thing is if we do ask for reformation it would be to make specific what now is only implied. It wouldn't be saying anything different in the contract. It would simply be saying it more specifically what is there.

The Court: I am asking you, are you required to do that?

Mr. Biggs: I do not think so, your Honor.

The Court: All right. [32]

Mr. Biggs: I do not think so. I suppose that depends on the Court's holding. If the Court holds that extrinsic evidence cannot be used to define merchantability but merchantability is a legal expression subject only to a legal definition——

The Court: Well, I am going to let you determine your own pleadings and your own evidence. I told you that before.

Mr. Biggs: Yes.

The Court: However, I was reading that Daugherty case and that Farragut Pine, and this sentence stuck in my mind. There remains one serious question for consideration. The defendant's cross-complaint does not refer to the growth of the timber, nor does it plead or present any facts showing any ambiguity in the particular

portion of the contract which provides for the sale of merchantable pine and fir timber and which further provides that purchaser is to cut only trees the logs from which will measure 10 inches or more at the top. Now, then, the Court goes on to hold that absent proof and pleadings merchantable timber means timber which is merchantable as of the date of the contract.

Mr. Biggs: Yes. Well, I think that the intention of the parties actually went further than that; that it may very well be in order to get the evidence completely before the Court that we ought to present the issue of reformation so as not to foreclose any showing of intent. But I believe that [33] the intent will show that even as of 1942 all of this that was taken off was merchantable in the definition or the proper construction of the word.

The Court: You don't claim that that cedar was properly——

Mr. Biggs: No, your Honor. I think we made the contention *de minimis*. In a trespass case there isn't a consent to the trespass. I suppose *de minimis* doesn't apply. Actually, the cedar was in such small quantities neither party knew there was any cedar on there and I don't think anybody else ever knew there was any cedar on there.

The Court: 8,000 feet, I think.

Mr. Biggs: Yes. Five trees on a rough area like this. Nobody knew anything about it.

The Court: Do you concede you are liable for stumpage on that?

Mr. Biggs: Yes, I think I would be inclined to

say that. I don't think there is any real issue about that. \$5.00 a thousand, \$40.00.

The Court: \$40.00.

Mr. Biggs: \$40.00. 8,000, \$5.00 a thousand, or—8,000—\$40.00, I believe it is.

Mr. Dezendorf: Of course, if it has to be trebled——

The Court: I don't think he would even object to that.

Mr. Biggs: Well, now, your Honor, that's running into [34] money fast when you start trebling.

The Court: All right.

Mr. Biggs: Was there any other thing? I have kind of said the things that were in my mind, but it may be I haven't covered the things that your Honor had in mind.

The Court: What about this statute of limitations that Mr. Dezendorf has commented upon? Is the statute of limitations involved in this case?

Mr. Biggs: Well, I presume that it is if he is asking for anything prior to—yes. Between June and November of 1950 there would be.

The Court: June and November of what year?

Mr. Biggs: 1950. See, they filed their original complaint in June, 1950.

The Court: I haven't read the original complaint. But I imagine it is here.

Mr. Biggs: It has nothing to do with the issue of merchantability.

Mr. Dezendorf: Just as much as this one does. It's a timber trespass claim and there isn't any——

Mr. Biggs: You probably wanted to say that to

the Court. I wanted to tell the Court just what the facts were here. The original complaint was a trespass, on the theory, your Honor, that we had overstayed our time on the premises; that we were to have gotten off within five years after the start of logging [35] and, therefore, everything that we touched five years after 1949 or, at least, everything that we cut over 1954 was unlawfully cut and we were liable for damages after that. The amended complaint filed November, 1956, covers different periods and a different quality of timber.

It goes back to everything prior to, as Counsel says, June, 1950.

The Court: How did you find out that that was their theory? Not from the complaint.

Mr. Biggs: Well, that was the theory upon which it was—I guess I will have to back up there. Mr. Strayer was handling it. Wasn't it submitted on a motion for summary judgment?

The Court: Well, it says——

Mr. Biggs: Isn't the time limited? Don't they limit it to June, '54, your Honor?

The Court: From July 1, '54, to December 21st, 1955.

Mr. Biggs: That's the way to find out. They limited their claim to timber that had been removed only after July, 1954, which they say—which they said then by deposition, I guess, was based upon the five-year period.

The Court: Well, I will take a look at that if I can find it.

You say that there is a three- or two-year statute of limitations with reference to penalty? [36]

Mr. Biggs: Three-year statute of limitations with respect to the treble damages, your Honor.

The Court: Is the case which Mr. Dezendorf refers to, that Kinzua Lumber Company case, in point?

Mr. Biggs: I don't think completely in point. They passed then only on the double-damage feature, your Honor. And they held there that double damages were not punitive because it did not require a showing of wilful damage.

The Court: So, as far as——

Mr. Biggs: But by inference, then, suggested that the treble damage would be because it's recoverable only upon proof of wilful misconduct of the trespasser.

Mr. Dezendorf: I disagree with his construction of the case.

The Court: In any event, you concede that if you are liable you would be liable for double damages?

Mr. Biggs: I will not here, your Honor. No. I am not, because of the consent theory, I think.

The Court: Oh, yes.

Mr. Biggs: Yes. If it is a trespass, if it is a direct trespass not consented to and on which there is no estoppel on his part to invoke any double damages, then I would say it is double damages.

The Court: All right.

Mr. Biggs: That would be true. [37]

The Court: All right.

Call your first witness.

Mr. Dezendorf: Well, I think there is one matter that we, perhaps, can do quickly which may shorten our proof a lot. I have only had a chance to briefly discuss this.

Mr. Biggs, it is my understanding—and you correct me if I am wrong—that you are now willing to stipulate to the material which was in Paragraphs 10 and 11 of the pretrial order as I submitted it?

Mr. Biggs: Let me just check this one minute. It will just take a minute, your Honor.

(Discussion held off record.)

I will stipulate, if the Court please, that if Counsel called a witness who was qualified to testify on the subject he would testify that the values—reasonable market values of timber of the species and kind set out in the table which is to be dictated would be the amount set opposite those units.

Mr. Dezendorf: May I make a suggestion that we include this paragraph as another admitted fact in the pretrial order?

(Discussion held off record.)

This is the table involved: Heading, Description with the Years 1950, '51, '52, '53, '54, '55, the descriptions being Old-Growth Douglas Fir: 15, 19, 24 29, 30 and 30. Second-Growth Douglas Fir: 5, 9, 14, 19, 24, 25-30. Hemlock: [38] 1, 2, 3, 4, 5 5. Cedar only under 1953: 5. Could I have one more moment?

(Discussion held off record.)

Call Mr. Seaver. Will you step forward and be sworn Mr. Seaver? [39]

JOHN N. SEAVER, JR.

produced as a witness in behalf of the Plaintiff, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Dezendorf:

Q. Mr. Seaver, where do you live?

A. I live in Florence.

Q. How long have you lived in Florence?

A. I lived in Florence since 1950.

Q. Where did you live prior to that?

A. In the Mapleton area.

Q. Now, can you just tell us generally about how far the real property involved here is from the City of Mapleton?

A. Approximately ten miles.

Q. Now, is that by airline?

A. No; I think that's road.

Q. How far would it be airline, do you know, approximately? A. Six or seven, perhaps.

Q. Is it southeast of Mapleton?

A. Generally south, yes.

The Court: Do you have a map of that?

Mr. Biggs: Yes. Your Honor, may I suggest this? I think it might be appropriate as even part of the opening statement, we have a stereoscopic map

(Testimony of John N. Seaver, Jr.)

with the equipment here to show it. And I think it would be worth while for your Honor actually [40] to examine the map under stereoscopic slide and you could use another map there, a flat map, to orient yourself.

Mr. Dezendorf: Of course, I have never seen it.

Mr. Biggs: I didn't have a chance to get it in my exhibits.

The Court: Let me see a flat map. Have you got a flat map?

Mr. Biggs: There is a flat map. Here is a color map. This is the vicinity map. Mark that Defendant's Exhibit.

The Court: He doesn't have to mark it yet.

Mr. Biggs: That's a vicinity map.

The Court: Show me where this Mapleton area is. Here is Florence. Mapleton is right here. Now, where is the tract of land? Is it in Township 31, part of it?

Mr. Biggs: It's Section 31.

The Court: Section 31?

Mr. Dezendorf: And Section 6 right below.

The Court: Yes.

Mr. Biggs: A little of it in Section 1, I believe.

The Court: And it is in the Siuslaw National Forest. All right. Go ahead.

Q. (By Mr. Dezendorf): Mr. Seaver, when did you first actually go upon the property that we are discussing here today?

A. I believe I was there in about 1942-1.

(Testimony of John N. Seaver, Jr.)

Q. Was that at the time the Warlicks [41] owned it? A. Yes.

Q. Did you know the Warlicks? A. Yes.

Q. What kind of a road was there in there to the place at that time, if any?

A. Practically no road.

Q. How did you get it?

A. Went in by the way of Sweet Creek over a County and Forest Service combination road about 20 miles.

Q. So, in order to go the four or five airline miles you had to go some 20 miles to get there, is that right? A. Yes.

Q. Would an ordinary automobile go over the road that you went in on?

A. Not the ones they have now, no.

Q. What kind of a car did you go in in?

A. Well, I don't remember if we went with Mr. Warlick. I believe we did. And he had an old car that he kept just for going to the ranch.

Q. Did it have big wheels on it?

A. Yes. It was an old model Buick with big high wheels.

Q. Now, do you know of your own knowledge when it was that a road was built into that property which was suitable for logging purposes?

A. Yes. [42]

Q. When was that? A. About 1949.

Q. Up to that time there was no read in there that could have been used to log the timber out, is that correct? A. I don't think so.

(Testimony of John N. Seaver, Jr.)

Q. Now, when did you first occupy the Warlick property for any purposes?

A. I believe it was 1947—or early '47, or, perhaps, it could have been '48. For pasture, I rented it.

Q. And you ran cattle or sheep there?

A. I had cattle on it, yes.

Q. And you think that was '47 or '48?

A. Yes.

Q. And was that continuous thereafter?

A. Yes; it has been.

Q. So that you had some cattle on there from '47 or '48 up through the time that you actually acquired title to the property, is that right?

A. Yes.

Q. Now, I take it that there isn't any dispute here that the logging started in '49—is that your recollection—on your property? A. Yes.

Q. What is now your property. Is it your recollection that they logged there in 1950, also? [43]

A. Yes.

Q. How much did they take out in 1950 as compared to '49?

A. Well, very little in '49. But it was——

Q. How much, relatively speaking, in 1950?

A. I don't know the exact footage, but it would many, many times over what '49 was.

Q. To your recollection was there any logging in '51?

A. I can't connect it with anything that would give me that date, no.

(Testimony of John N. Seaver, Jr.)

Q. What about '52?

A. I don't know of anything that would connect that date as being—logging going on there.

Q. In '53 was there logging there?

A. Yes; I remember that.

Q. What about '54?

A. No. I think the strike pretty well had them stopped in '54.

Q. What about '55?

A. There was some in '55.

Q. Now, I believe the contract that the defendant pleads in its answer between yourself and United States Plywood was dated August 19th, 1955. When was that contract actually signed?

A. Well, it was late in the fall. I am not sure of the exact date. I know—I know I didn't sign it when they had it, or didn't say something about it, or something. [44]

Q. Mr. Seaver, when did you first find out that you had a claim against the defendant or its predecessor for taking timber from this property to which they were not entitled?

A. That was in early spring of 1956.

Q. How did you find it out then?

A. I went to Mr. Hoffman and talked to him.

Q. He is the Mr. Hoffman who is your attorney in this case?

A. My attorney, yes.

Q. Did you remove any timber from the property involved after Mr. Hoffman gave you that advice?

A. No.

Q. Did you complain about the timber that had

(Testimony of John N. Seaver, Jr.)

been removed shortly after that advice was given you by Mr. Hoffman?

A. Yes. Mr. Hoffman took care of that.

Q. And he is the one that complained for you?

A. Yes.

Mr. Dezendorf: I will offer at this time Exhibit 2, which is the assignment.

Mr. Biggs: No objection.

The Court: Admitted.

(At this point a three-page document entitled Assignment, dated November 16, 1956, was marked for Identification as Plaintiff's Exhibit No. 2.)

Mr. Dezendorf: I will offer Exhibit 1, which is the [45] Warlick contract.

Mr. Biggs: No objection.

The Court: Admitted.

(At this point a six-page document, Agreement, dated 4th of May, 1942, was marked for Identification as Plaintiff's Exhibit 1.)

Mr. Dezendorf: I will offer Exhibit 6, which are the stubs on the checks he received from U. S. Plywood.

The Court: Admitted. Now, I will tell you what I will do.

Mr. Biggs: I think, your Honor, I didn't notice on the pretrial order the objections in the conference we had in your—there are some of them I had

(Testimony of John N. Seaver, Jr.)

marked objections to. And I don't believe I marked them on there.

The Court: Now, I notice the plaintiff's exhibits go from 1 to 32. How many are you offering?

Mr. Dezendorf: Well, let's see. We have got some checks here. Some of them are going to be blank numbers, it turns out, because we combined——

The Court: But let's take 1 to 32 first.

Mr. Dezendorf: Well, out of that 10 and 11 are combined with 14. So 10 and 11 are blank as such.

The Court: All right. I am going to go down—you read. I suggest it be done this way: You say 1 and find out if there is any objection. If there is no objection, they are [46] admitted automatically.

Mr. Dezendorf: All right. I will offer Exhibit 1.

Mr. Biggs: No objection; 2, no objection.

Mr. Dezendorf: 3, which is the map over there by the——

Mr. Biggs: No objection.

(At this point Plaintiff's Exhibit 3, an aerial photograph, was received in evidence.)

Mr. Dezendorf: 4, which is the timber removal affidavit.

Mr. Biggs: Object to relevancy and competency.

The Court: Your objection will be overruled. It may be admitted.

(At this point Plaintiff's Exhibit 4, affidavit of Timber Removal, was received in evidence.)'

(Testimony of John N. Seaver, Jr.)

Mr. Dezendorf: 5, which are the conservation harvest permits.

Mr. Biggs: No objection.

Mr. Dezendorf: 6, I guess, are the stubs which you just——

Mr. Biggs: The only thing about 5, the only question I raised was I don't think you have all of them there. But we will follow that up.

Mr. Dezendorf: 6, is it?

Mr. Biggs: No objection. [47]

Mr. Dezendorf: 7.

Mr. Biggs: My objection is that is the material that is put on there. I would presume it's argumentative, your Honor, and it contains data which we dispute. So that part of the map we object to.

The Court: Will you have testimony to connect that up?

Mr. Dezendorf: That's right. It is the testimony—it will be the testimony of Mr. Jones as to the amount.

The Court: All right. We will delay that one.

Mr. Dezendorf: All right. Then, 8. I don't think you have any objection to that.

Mr. Biggs: Well, for the same reason, if the dates on which you say those areas are logged off——

Mr. Dezendorf: I should explain this one. This just has on it the dates of timber removal affidavits which are already in evidence to show them by area.

(Testimony of John N. Seaver, Jr.)

The Court: All right. The objection is overruled and I am going to permit it to come in.

(At this point Plaintiff's Exhibit 8, Map showing logging dates taken from affidavits, was received in evidence.)

Mr. Biggs: All right. Except that—that's all right, your Honor, as long as it's understood that it says logged between such and such a date.

Mr. Dezendorf: As shown by the affidavits. It's just [48] taken from the affidavits.

Mr. Biggs: It's only argumentative. Go ahead.

Mr. Dezendorf: 9.

The Court: Its relevancy is related to the timber removal affidavit and it's merely to clarify the timber removal affidavit.

Mr. Dezendorf: It's so shown where they fit on the map.

The Court: All right.

Mr. Biggs: By their theory, your Honor.

The Court: Well, that's right.

Mr. Biggs: Yes.

Mr. Dezendorf: All right, 9.

Mr. Biggs: What is that?

The Court: 9 is the same thing. It's their theory of where they have logged after the timber affidavits——

Mr. Dezendorf: That's correct.

The Court: Now, I think I am going to admit that also because—perhaps I should state here now

(Testimony of John N. Seaver, Jr.)

that I think the timber removal affidavits are admissible as an admission against interest——

Mr. Biggs: Yes.

The Court: ——by a person who was charged with responsibility of doing it unless you come forward and show that he didn't have the authority.

Mr. Dezendorf: Well, I think the Court should have in [49] mind, too, the specific provision of the contract involved which is quoted in Paragraph 3 of the pretrial order and the admitted facts which reads as follows:

“That Siuslaw should pay ‘any and all taxes and fire patrol assessments or other assessments, if any there be, lawfully levied and assessed against said timber (exclusive of the land) commencing with the 1942-1943 taxes throughout the life of this agreement and until the timber purchased and sold hereunder shall have been cut and removed or the same abandoned * * *’”——

The Court: Yes.

Mr. Dezendorf: ——“* * * by Siuslaw.”

The Court: Well, I don't think that adds anything to it.

Mr. Biggs: No.

The Court: But that's my view.

Mr. Dezendorf: 12.

Mr. Biggs: I have no objection except as to the relevancy. I presume that they are all—I don't know the dates or the times of them, but I don't question their authenticity. They are some parts of the property.

(Testimony of John N. Seaver, Jr.)

The Court: Can you tell us what date they were taken?

Mr. Hoffman: Your Honor, they were taken about a month or two ago in Mr. Seaver's [50] presence.

The Court: All right.

Mr. Dezendorf: Well, I take it we don't offer the depositions as such; 14 are the cruiser's charts, which includes what was formerly marked 10 and 11.

Mr. Biggs: If your Honor doesn't object, I would like to have that passed over for this reason: It contains many documents, some of which are put in only——

The Court: I miss the Rule.

Mr. Biggs: I haven't had a chance to study them.

The Court: It is perfectly all right. I am not urging you to consent to anything. I just want to know the exhibits to which you do consent.

Mr. Biggs: I think there will not be after we have had a chance to see them——

Mr. Dezendorf: 15.

Mr. Biggs: That's the same thing, isn't it?

The Court: All right.

Mr. Biggs: Things that the cruiser may want to refer to but may not want to?

Mr. Dezendorf: That's right.

Mr. Biggs: Log-scaling rules.

Mr. Dezendorf: 16.

Mr. Biggs: We admit their authenticity. We

(Testimony of John N. Seaver, Jr.)

object to their relevancy. At least, we don't see the relevancy.

The Court: What do you claim for them? [51]

Mr. Dezendorf: As long as he has now admitted the prices, it's conceivable we may not need them, although if we get into argument about dimension of timber they will be——

The Court: All right. I am going to withhold judgment on that one.

Mr. Dezendorf: 17.

Mr. Biggs: That's—on the relevancy I object to that. It came from our files. We see no relevancy to it. But it was written prior to the logging operation here. But if you want to put it in, why——

Mr. Dezendorf: We do. We think it's relevant. It shows there wasn't any way to get timber out.

Mr. Biggs: We admit that we got the road up there. Until we got the road up there it was inaccessible, of course.

Mr. Dezendorf: 18, which is defendant's timber—and I have inserted this to conform to the deposition description of the inventory and depletion records.

The Court: Any objection?

Mr. Biggs: No objection.

The Court: Admitted.

(At this point Plaintiff's Exhibits 18-A and 18-B, Timber Inventory and Depletion records of defendant, were received in evidence.)

(Testimony of John N. Seaver, Jr.)

Mr. Dezendorf: Will the Court mind making that insert on [52] the original?

The Court: It's already done.

Mr. Dezendorf: 19, they haven't as yet conceded for my use. 20 are the two big maps that are here.

Mr. Biggs: No objection.

The Court: All right.

(At this point Plaintiff's Exhibit 20, Defendant's Timber Maps, were received in evidence.)

Mr. Dezendorf: 30.

Mr. Biggs: 30 or 21?

Mr. Dezendorf: 30.

The Court: You are not offering 21 to 30?

Mr. Dezendorf: They were things that I expected them to supply me with, which hasn't been done.

The Court: All right.

Mr. Dezendorf: And I am not making very much noise about it now because I am not so sure they are too relevant at the moment; 30, of course, is a sealed exhibit that wouldn't go in now, anyhow. 31?

Mr. Biggs: That's the Lane County road map?

Mr. Dezendorf: Yes.

The Court: Admitted.

(At this point Plaintiff's Exhibit 31, Map of Lane County Market Roads, [53] was received in evidence.)

(Testimony of John N. Seaver, Jr.)

Mr. Dezendorf: 32 are the Forest Service records that are being copied so they are not available at the moment.

The Court: All right. What have you got?

Mr. Biggs: Well, we haven't had a chance to get ours displayed here.

Mr. Dezendorf: I haven't seen his yet.

The Court: That's all right. I am not going to see them either for awhile.

Mr. Dezendorf: I might say for whatever benefit it has, I have here and ask the Court to take judicial knowledge of the definition of merchantable as contained in Webster's New International Dictionary, Second Edition Unabridged, which I noted the other day is the same one you have in your chambers which is the one we have in our office.

The Court: And my dictionary is at least 100 years old, or it looks like it.

Mr. Dezendorf: Here is a copy for you. Would you hand that to the Court, please?

The Court: I want to see that as between the Oregon Supreme Court and Webster's International Dictionary. I think I am more bound by the Supreme Court of Oregon with all their shortcomings.

(At this point except as indicated by the parentheticals concerning receipt of [54] documents, all exhibits were received in accordance with the Court's remark prior to the discussion concerning Plaintiff's Exhibits.)

(Testimony of John N. Seaver, Jr.)

Cross-Examination

By Mr. Biggs:

Q. You say that you were in Florence since 1950? A. That's my main interest, yes.

Q. But you were back and forth in this Mapleton area during all of those years, were you not?

A. Yes.

Q. Actually, you were logging, doing some logging on the Warlick tract or Tucker tract during those years, weren't you?

A. One time, yes.

Q. Just one time? A. Yes.

Q. What time was that?

A. Late in the fall of 1955.

Q. Who were you working for then? Was that the time that you were working for yourself?

A. Yes.

Q. When you had a contract with the United States Plywood? A. Yes.

Q. Well, weren't you working for Siuslaw Logging Company when [55] they were logging on the Warlick tract? A. Not that I know of.

Q. Did you ever work for them as a logger?

A. No.

Q. Oh. You did not? A. No.

Q. I understood you in your deposition to say that you had. Had you ever done any logging for any of the—employed by any of the logging contractors who were taking timber off of the Warlick property? A. Yes.

(Testimony of John N. Seaver, Jr.)

Q. When? A. 1949.

Q. For Kontich Logging Company?

A. Yes.

Q. Is that the only time? A. Yes.

Q. The Kontich Logging Company and the time that you had a contract of your own; and those are the only two logging operators that you worked for or the only logging you did on that tract?

A. I am afraid I don't understand what you mean. You get too much in one question.

Q. Well, you know what logging means, and you have worked for logging companies, have you not? [56] A. Yes.

The Court: I think the difficulty is that he says he worked for the company but he hasn't admitted that he worked in '49 on this particular tract.

Mr. Biggs: I see.

Q. Did you work on the Seaver tract in 1949?

A. Yes.

Q. By the Seaver tract we are talking about this tract (indicating)? A. Yes.

Q. Now, did you do any logging for yourself or anybody else on the Seaver tract between 1949 and 1955? A. No.

Q. What were you doing during those years, then? A. '49 to '55?

Q. Yes, sir.

A. Since 1950, I been self-employed.

Q. Well, I mean, what kind of work have you been doing? A. Logging, primarily.

(Testimony of John N. Seaver, Jr.)

Q. Logging. In that area, in the Mapleton area, or closer to Florence, or where?

A. Closer to Florence; although it's been in the Mapleton area.

Q. I had understood that you had worked for the Siuslaw Logging Company when they were logging the Seaver tract? [57] A. No.

Q. When you bought this property from Mr. Tucker, what did you pay for it? A. \$6,500.

Q. That figured roughly about \$16 an acre, is that correct?

A. I have never figured it out that way.

Q. Yes. There are 414 acres on the property, are there not?

A. That isn't the figure that the deed calls for.

Q. Pardon?

A. That isn't the figure that the deed calls for.

Q. Well, how much does the deed call for?

A. 413, I believe.

Q. All right. 413 acres. And you paid \$6,500 for it. You bought that from Mr. Warlick?

A. No.

Q. Not Mr. Warlick, Mr. Tucker.

A. Yes.

Q. At the time you bought that you assumed you were buying only the land; you didn't assume that you were buying any timber on that, isn't that correct? A. That's correct.

Q. Yes. Mr. Tucker didn't represent that you were getting any timber and you didn't think you were getting any timber, isn't that correct?

(Testimony of John N. Seaver, Jr.)

A. Yes. [58]

Q. Then when you subsequently obtained an assignment from Mr. Tucker of whatever rights he might have against U. S. Plywood, you solicited that assignment, did you not?

A. I asked for it, yes.

Q. You went down to see Mr. Tucker, did you not?

A. Yes.

Q. He lives in California?

A. Yes.

Q. You told him that you wanted it to include with the claim that you were bringing against them in the Federal Court in Portland, is that correct?

A. I don't remember the exact words I told him when I asked him to assign that.

Q. Did you pay him any consideration at all for it?

A. No.

Q. He didn't say to you that he thought he had any rights against U. S. Plywood, did he?

A. He was surprised that they were still in the area.

Q. Yes. He didn't say to you that he thought they had ever taken off any timber that they were not entitled to take off, did he?

A. We didn't discuss the timber they took off, I don't believe.

Q. Well, the point is he didn't consider that he had a claim against U. S. Plywood on account of the timber that had been [59] taken off of that property; isn't that correct, Mr. Seaver?

A. He felt that when he sold it to me that any rights or any contract went with the property.

(Testimony of John N. Seaver, Jr.)

Q. Well, that isn't quite the question I asked you. Did he not tell you in so many words that he didn't regard himself as having any rights against U. S. Plywood?

A. I am afraid I don't follow what you—what you want me to say, what you are after.

Mr. Biggs: Would you read the question? I mean to be co-operative.

(At this point Mr. Biggs' last question to the witness was read by the Court Reporter.)

The Witness: His rights—I don't think his rights were brought up. I didn't talk with him about his rights.

Q. (By Mr. Biggs): Well, that's what you were obtaining from him, an assignment of his rights, weren't you?

A. He felt the contract went with the property, he told me. He says, "Whatever was there," he says, "I have sold it all to you." He says, "It's all yours." That's what he told me.

Q. Yes. But what you were talking about was some right of action that he had acquired against U. S. Plywood before you bought the property; isn't that what you understood the assignment to be?

A. Well, I understood the assignment was just giving me his [60] interest that he might have held beforehand, yes.

Q. All right. Well, the question, then, was did

(Testimony of John N. Seaver, Jr.)

he tell you that he felt that he had a claim against U. S. Plywood?

A. I am afraid—I don't think he—we didn't talk about if he had any claims or anything against them.

Q. Did he ask you what you wanted the assignment for? A. Yes.

Q. What did you tell him?

A. I told him that my attorney advised me to get the assignment from him.

Q. Yes. And you didn't know what the assignment meant?

A. Well, I knew it pertained to the timber contract.

Q. Well, did he read the assignment?

A. Yes.

Q. Do you remember when your deposition was taken in your attorney's office very recently, Mr. Seaver? A. Yes.

Q. I was doing the examining. I asked you this question——

Mr. Dezendorf: What page?

Mr. Biggs: On Page 31. "Relating to the assignment"—I will just give you two or three questions in advance here so that you will get the background.

"Q. Did he say, in effect, to you * * *"—and I am referring now to your conversation with Mr. Tucker—" * * * that he didn't feel that he had any rights [61] there that he could charge you for?

(Testimony of John N. Seaver, Jr.)

“A. Well, he felt when I bought the place that everything went with it.

“Q. Everything that was on the place then went with it, and any right he might have went with it?

“A. Yes; he was glad to give me it.

“Q. Did he tell you that he felt he had any right?”

Your answer: “No, he didn’t feel like he had any.”

Do you remember those questions being asked you and those answers given? A. Yes.

Mr. Biggs: Yes.

The Court: Is that correct?

The Witness: Yes.

The Court: Those answers are correct?

The Witness: Yes.

Mr. Biggs: Yes.

Q. Mr. Seaver, you discussed with Mr. Hoffman your rights under the contract as against U. S. Plywood shortly after you bought the property in 1952, did you not?

A. I don’t remember going into detail on it, no.

Q. Well, didn’t you take the contract in to him at that time and ask him to go over it and tell you what your rights were with respect to it? [62]

A. He handled the paper work when I bought it.

Q. Well, did he have the contract?

A. Yes.

Q. I am speaking now of the copy of the contract from Warlick to Siuslaw Forest Products.

A. Yes.

Q. He had a copy of that?

(Testimony of John N. Seaver, Jr.)

A. I believe he did.

Q. You consulted him with respect to your rights under that contract, is that correct?

A. Yes.

Q. That was in 1952? A. Yes.

Q. Now, at that time had most of the timber been taken according to your recollection—had been taken off the property; is that what you said a moment ago? A. I believe so, yes.

Q. Yes. Did he advise you or did you at that time ask him for advice as to whether you had any rights against U. S. Plywood because of timber that they might have unlawfully removed from your premises?

A. I don't believe I asked him that.

Q. Yes. He looked over the contract, however?

A. Yes. He must have read it.

Q. And you knew at that time the type of timber that had [63] been taken off and how much had been taken off, approximately?

A. Well, it would have just been a guess. I didn't know how much. It would have been a guess.

Q. Did you read the letter that he wrote following that conference?

A. I expect I had a copy of it. I read it.

Q. I will ask you——

This isn't marked, your Honor. It's listed.

The Court: All right. Mark it.

Mr. Biggs: What is the defendant's Exhibit, Mr. Husband?

(Testimony of John N. Seaver, Jr.)

Mr. Husband: That will be Defendant's Exhibit 72 under your numbers. Are you beginning with 50?

The Clerk: Yes.

The Court: Have you got another letter that you want to show to him?

Mr. Biggs: Yes. And 73.

(At this point a letter dated October 13, 1952, from Lewis Hoffman to Siuslaw Forest Products, Inc., was marked for Identification as Defendant's Exhibit 72.)

(At this point a letter dated March 14, 1956, from Mr. Lewis Hoffman to United States Plywood Corporation was marked for Identification as Defendant's Exhibit 73.) [64]

The Court: All right, Mr. Biggs. He is ready.

Mr. Biggs: Yes.

Q. Have you read both letters?

The Court: No.

Mr. Biggs: All right. The first letter is 72.

Q. Was that written in your behalf?

A. Yes.

Q. Following your conversation? A. Yes.

Mr. Biggs: We will offer that in evidence, if the Court please.

Mr. Dezendorf: I have not seen it, your Honor.

The Court: All right. Now, show him the letter, 73.

Mr. Biggs: Mark this for identification 68 and 69.

(Testimony of John N. Seaver, Jr.)

A. I believe he did.

Q. You consulted him with respect to your rights under that contract, is that correct?

A. Yes.

Q. That was in 1952? A. Yes.

Q. Now, at that time had most of the timber been taken according to your recollection—had been taken off the property; is that what you said a moment ago? A. I believe so, yes.

Q. Yes. Did he advise you or did you at that time ask him for advice as to whether you had any rights against U. S. Plywood because of timber that they might have unlawfully removed from your premises?

A. I don't believe I asked him that.

Q. Yes. He looked over the contract, however?

A. Yes. He must have read it.

Q. And you knew at that time the type of timber that had [63] been taken off and how much had been taken off, approximately?

A. Well, it would have just been a guess. I didn't know how much. It would have been a guess.

Q. Did you read the letter that he wrote following that conference?

A. I expect I had a copy of it. I read it.

Q. I will ask you——

This isn't marked, your Honor. It's listed.

The Court: All right. Mark it.

Mr. Biggs: What is the defendant's Exhibit, Mr. Husband?

(Testimony of John N. Seaver, Jr.)

Mr. Husband: That will be Defendant's Exhibit 72 under your numbers. Are you beginning with 50?

The Clerk: Yes.

The Court: Have you got another letter that you want to show to him?

Mr. Biggs: Yes. And 73.

(At this point a letter dated October 13, 1952, from Lewis Hoffman to Siuslaw Forest Products, Inc., was marked for Identification as Defendant's Exhibit 72.)

(At this point a letter dated March 14, 1956, from Mr. Lewis Hoffman to United States Plywood Corporation was marked for Identification as Defendant's Exhibit 73.) [64]

The Court: All right, Mr. Biggs. He is ready.

Mr. Biggs: Yes.

Q. Have you read both letters?

The Court: No.

Mr. Biggs: All right. The first letter is 72.

Q. Was that written in your behalf?

A. Yes.

Q. Following your conversation? A. Yes.

Mr. Biggs: We will offer that in evidence, if the Court please.

Mr. Dezendorf: I have not seen it, your Honor.

The Court: All right. Now, show him the letter, 73.

Mr. Biggs: Mark this for identification 68 and 69.

(Testimony of John N. Seaver, Jr.)

(At this point a four-page document entitled Logging Contract was marked for Identification as Defendant's Exhibit 68.)

(At this point a letter dated December 5, 1955, from United States Plywood Corporation, Mapleton Division, to Mr. John N. Seaver, Jr., was marked for Identification as Defendant's Exhibit 69.)

Mr. Dezendorf: No objection to 72.

The Court: It will be admitted.

(At this point a letter dated October 13, [65] 1952, from Lewis Hoffman to Siuslaw Forest Products, Inc., previously marked for Identification, was thereupon received in evidence as Defendant's Exhibit 72.)

The Court: All right. Give it to him.

Q. (By Mr. Biggs): That was a copy of a letter also written in your behalf? A. Yes.

Q. Following a conversation that you had with him prior to the——

Mr. Dezendorf: We know about that.

Q. (By Mr. Biggs): ——filing of the lawsuit?

Mr. Dezendorf: No objection.

The Court: No objection? Admitted, 73.

(At this point the letter dated March 14, 1956, from Lewis Hoffman to U. S. Plywood Corporation, previously marked for Identification, was received in evidence as Defendant's Exhibit 73.)

(Testimony of John N. Seaver, Jr.)

Q. (By Mr. Biggs): I ask you to examine the Defendant's Exhibit 68. Is that a copy of the contract, Mr. Seaver, that you entered into with U. S. Plywood? A. I believe it is. I haven't—

Q. A photostatic copy. I won't ask you to read all the other if you will just verify the signature there. [66] A. Looks like my signature.

Mr. Biggs: Yes. We offer that in evidence, if the Court please.

Mr. Dezendorf: We object to it for the reason and upon the ground that under the witness' testimony it was not actually entered into until December of 1955 after the operative facts had occurred which are the subject matter of this proceeding. In addition, there is not a basis for an estoppel, so that it is immaterial.

Mr. Biggs: Yes.

The Court: Is it true that this contract was entered into subsequent to the removal of the 488,000 feet of timber in 1955?

Mr. Biggs: No. I think whatever the stipulated figures are there includes the amount that he removed, your Honor. That is according to our information.

Mr. Dezendorf: That's not ours.

Mr. Biggs: But the point that I offer this for at this time is not only to show estoppel and consent; it's to show by the recitals in the contract an acquiescence in the fact U. S. Plywood owned that timber.

The Court: I am going to overrule the objection. It will be admitted.

(Testimony of John N. Seaver, Jr.)

(At this point the document entitled Logging Contract, previously marked for Identification, was received in [67] evidence as Defendant's Exhibit 68.)

The Court: I would like to find out from the witness about the events leading up to the execution of the contract. Will you go into that?

Mr. Biggs: I will if I can just finish this one other document, your Honor.

Q. After the contract had been entered into you applied for an extension of time under that contract to complete your logging, did you not, Mr. Seaver?

A. Late in the season we talked about it, yes.

Q. As a matter of fact, the contract carried a penalty clause imposing some penalty on you if you didn't bring in all the logs that you felled, isn't that correct?

A. Yes.

Q. It specified the size of the logs which you should bring, isn't that correct?

A. I don't remember. I didn't read——

Q. It defined merchantability within the contract?

A. I didn't read it. I don't remember.

Q. Now, is the document that you have in your hand and marked for Identification 69 the extension that was granted to you by U. S. Plywood to permit you to perform your contract?

A. I expect it is.

(Testimony of John N. Seaver, Jr.)

Q. Well, you received the original of that, of which that's a copy, did you not? [68]

A. I believe I did.

Mr. Biggs: We offer that in evidence.

The Court: What is the date? What is the date on it?

Mr. Biggs: December, 1955.

Q. Giving you until August, 1956, isn't that correct?

Mr. Dezendorf: Same objection.

The Court: Fine. Your objection is overruled.

Mr. Biggs: Yes.

(At this point the letter dated December 5, 1955, from U. S. Plywood Corporation, Mapleton Division, to Mr. John N. Seaver, Jr., previously marked for Identification, was thereupon received in evidence as Defendant's Exhibit 69.)

Q. (By Mr. Biggs): Now, when did you negotiate with U. S. Plywood for that contract, Mr. Seaver? When did you request the opportunity to do logging on your place from U. S. Plywood?

A. When I talked to U. S. Plywood about logging it wasn't—my place was just one of several places over there.

Q. Well, when was it?

A. In the summer of 1955.

Q. In the summer of 1955? A. Yes.

Q. You wanted to start logging for them, is that correct? A. Yes. [69]

(Testimony of John N. Seaver, Jr.)

Q. Now, what logging did you do under that contract?

A. Well, I logged the right of way for them. That wasn't on this place at all——

Q. No. I say under that contract. Under the contract of August, 1955, what logging did you perform?

A. Well, I logged about 100,000 off of my property.

Q. When?

A. I believe I started in December, 1955.

Q. You mean from August to December you didn't perform under this contract?

A. I was working on some other timber of theirs.

Q. What other timber?

A. Well, it was a road right of way about two and a half miles from there that they wanted removed.

Q. You mean for the U. S. Plywood?

A. Yes.

Q. I see. So that some time in December you cut and removed 108,000 feet; December, 1955?

A. A little over a hundred thousand. I don't know the exact figure.

Q. All right. Then did you resume logging after December, 1955?

A. No; not for them.

Q. Isn't it a fact that you felled a considerable number of trees which you did not remove but which were still on your [70] place under that contract?

A. Yes.

(Testimony of John N. Seaver, Jr.)

Q. When did you do that?

A. I don't know the exact date.

Q. Well, it was after December of '55, was it not?

A. No; it was not.

Q. Why didn't you haul those logs in and deliver them with the logs that you delivered in December of '55?

A. I logged—I felled that timber in the late summer of '55 between—oh, I don't know what the reason was. We were falling to keep busy. And after December, 1955, is when I went to talk to Mr. Hoffman, regards this contract.

Q. Well, just a minute. What you said a moment ago is not correct, then, that you didn't start performance under that contract until December of '55. You started falling out there in August of '55?

A. I don't know what month it was. We did fall some timber over there, yes.

Q. How much did you fall that you didn't bring in?

A. I don't know.

Q. Well, haven't you any estimate? You know you delivered 108,000 feet. Now, how much more did you fall?

A. I didn't pay for it to be felled by the thousand. And the only way I have is—to get a figure on a scale is when it's loaded out. [71]

Q. Well, did you fall more than you delivered or less than you delivered?

A. No; I think probably less.

Q. A great deal less or just a little less?

(Testimony of John N. Seaver, Jr.)

A. A little less, perhaps. I don't know exactly.

Q. It would be in the neighborhood of 100,000 feet? A. Perhaps 75,000.

The Court: Who did the felling?

The Witness: Fellows I had hired working by the hour.

The Court: You paid them by the hour?

A. Yes.

The Court: So you didn't have to measure it?

The Witness: No.

Q. (By Mr. Biggs): Now, Mr. Seaver, you went to see Mr. Hoffman again, you say, some time in the spring of 1955? A. -6.

Q. 1956? A. Yes.

Q. The lawsuit that Mr. Hoffman was authorized to start for you, this lawsuit, this trespass case, was based upon your claim and his advice to you, wasn't it, that the U. S. Plywood was trespassing because they had not completed their logging operations within five years after they started; isn't that correct? A. Yes. [72]

Q. He didn't, then, advise you and you didn't request advice or didn't assume that you had any right for damages against U. S. Plywood because of the removal of any non-merchantable trees, did you?

Mr. Dezendorf: If the Court please, I would have to object to that. This case started out as a trespass case and it still is a trespass case.

The Court: I don't know what the relevancy would be, anyway. Suppose this man didn't know

(Testimony of John N. Seaver, Jr.)

all of his right? Does it mean that he can't assert them now?

Mr. Biggs: No, your Honor; not at all. I just simply want to show that until the amended complaint was filed here nobody who had any connection with this tract of timber from——

The Court: He got a new lawyer.

Mr. Biggs: ——until the last man ever thought that there was any right in U. S. Plywood to take the timber off that place and U. S. Plywood doesn't think yet——

The Court: Well, but, I can't see the relevancy of it.

Mr. Biggs: Acquiescence in the subsequent conduct of the parties, your Honor, is stressed in the Hughes-Heppner case and in the Harris Pines case.

The Court: Oh, I think there is a little difference.

Mr. Biggs: As bearing upon the construction of the contract?

The Court: Yes. Yes. How the parties deal with each [73] other and view that contract during its performance is evidence of what the parties meant.

Mr. Biggs: Yes, sir.

The Court: But in this particular case Mr. Seaver never drew the contract. He was never a party to the Warlick contract with Siuslaw Logging Company or Forest Products Company and you are asking him about conversations which he

(Testimony of John N. Seaver, Jr.)

had with his lawyer long after any timber had been removed.

Mr. Biggs: No. They were still, I think, performing the contract.

The Court: No.

Mr. Dezendorf: No.

Mr. Biggs: What?

The Court: That was in the spring of 1956.

Mr. Biggs: '56.

The Court: And the last timber that was removed was in December, 1955.

Mr. Biggs: '55. '55. That may very well be. Of course, we think, your Honor, just to make our position straight there, that he was a privy to the contract because his title derives from Warlick like our title derives from Warlick through main conveyances and with knowledge on the part of him and his predecessors as to what the——

The Court: You don't have to prove it. I think that's part of the plaintiff's proof. It was Mr. Dezendorf who said [74] that this man is not estopped because he never knew what his rights were. So they didn't contend that he knew that he had those rights which he is now contending for.

Q. (By Mr. Biggs): Did you ever make any objection at any time that you owned property—to the removal of any of this timber from the property, Mr. Seaver?

A. Not till Mr. Hoffman wrote them a letter.

Q. Well, which letter are you talking about?

A. Well, I expect it was in the spring of '56.

(Testimony of John N. Seaver, Jr.)

Q. In 1956. That's the first and only objection you ever made? A. Yes.

Q. During the years after you acquired the property, did you regularly apply to the U. S. Plywood offices for reimbursement for the timber taxes? A. Yes. Not regularly, but I——

Q. Well, you annually obtained reimbursement for the fire patrol assessments which were charged against your land and you asked them also to allocate some part of general taxes to the timber and pay that, did you not?

A. I think it was a timber tax. I don't know. The contract tells what it was.

Mr. Biggs: Yes.

The Court: Is there any dispute about that particular issue? [75]

Mr. Dezendorf: No.

The Court: There is no controversy, Mr. Biggs.

Mr. Biggs: All right. I will offer these.

Mr. Dezendorf: The amounts are small. It might be of interest to the Court to see what they were.

The Court: You admit it?

Mr. Biggs: We will have it marked for identification—four—six checks.

Mr. Dezendorf: They may be admitted as far as we are concerned.

Mr. Biggs: All right.

The Court: Admitted.

(At this point copies of four checks to John Seaver in payment of timber taxes on prop-

(Testimony of John N. Seaver, Jr.)

erty, previously marked for Identification as Defendant's Exhibit 65, were received in evidence.)

Q. (By Mr. Biggs): As a matter of fact, during all of the years of 1949 to and until you talked with Mr. Hoffman you did not have any objection to U. S. Plywood taking timber off the property?

Mr. Dezendorf: Well, I would object to that. It goes for a period way long before he acquired any interest in it.

Mr. Biggs: I am talking about '52.

Mr. Dezendorf: You said '49. [76]

Mr. Biggs: All right.

Q. From '52 when you first acquired an interest in it?

A. I don't think I ever made any objection.

Q. No. That wasn't the question. I said you did not have any objection to their taking the timber off——

Mr. Dezendorf: Well——

The Witness: No.

Mr. Dezendorf: ——I would object to that.

Mr. Biggs: The answer is No.

Mr. Dezendorf: If he didn't know what his objection was, how could he object?

The Court: He can say he had no objection, and then you can bring out that he didn't know his rights.

Mr. Dezendorf: Of course, this is all in the Agreed Facts in the pretrial order. I don't know why he is going into it.

(Testimony of John N. Seaver, Jr.)

Mr. Biggs: This is difficult. I am not asking whether he—I didn't—I asked if he had an objection. That calls for a statement of his mind.

Q. Did you have an objection at that time?

A. No.

Mr. Biggs: All right. I think that's all.

Redirect Examination

By Mr. Dezendorf:

Q. Mr. Seaver, you would have objected if you knew they [77] weren't entitled to take the timber from the property when they took it?

A. If I had known it, of course.

Q. Now, did you cut this timber on your land in 1955 before the contract with U. S. Plywood, dated August 19th, 1955, was actually executed?

A. Yes. I cut timber before that was ever signed.

Q. On the anticipation that it would be signed some time? A. Yes.

The Court: Did you cut any after the contract was signed?

The Witness: I don't remember the exact date it was signed. I had the timber all cut way before December; I know that—I mean before the last of December. I cut, maybe, the early part. But I don't remember the exact dates.

The Court: Had you seen a draft of the contract before the final one was ever presented to you for your signature?

(Testimony of John N. Seaver, Jr.)

A. Well, I was logging their timber first on this road right of way. And they talked about a contract; that they would have to fix one up, but they just didn't seem to get around to it. That was early in the summer.

The Court: Had you ever executed other kinds of contracts with U. S. Plywood?

The Witness: I don't believe I had ever signed any timber contracts. The first I ever signed with them. [78]

The Court: What do you mean, a timber contract? A contract authorizing you to cut timber?

The Witness: Yes.

The Court: How did you do it before, just on oral understanding?

The Witness: I logged timber of theirs on an oral understanding, yes, in the summer of '55.

The Court: Who wanted you to sign this contract; they, or did you suggest that you have a written contract?

The Witness: No; I think they said they would have to have a contract signed.

The Court: All right.

Mr. Dezendorf: That's all.

Recross-Examination

By Mr. Biggs:

Q. Had you ever signed a logging contract before with anyone?

A. I don't believe I ever signed a contract for gypso logging.

(Testimony of John N. Seaver, Jr.)

Q. You don't think you ever had?

A. No; I don't believe——

Q. Why didn't you ask for an extension of time till December if you had long since completed your work?

A. At that time this other timber that was felled was still laying there, couldn't be gotten out.

Q. That's what I can't understand. Why couldn't it have been [79] gotten out at the time it was felled?

A. In gravel road, wintertime, dirt?

Q. It was felled after the rain set in?

A. No.

Q. You couldn't get it out in August when the roads were dry?

A. That was a job that we worked in when we was cutting their other—removing other timber of theirs. Maybe just a day in a week or part of a day we were cutting on that.

Mr. Biggs: That's all.

Mr. Dezendorf: That's all, Mr. Seaver.

The Court: That's all. I think it might be well to take a short recess for the benefit of our Reporter whose hands get tired.

(Witness excused.)

(Recess taken.)

Mr. Dezendorf: Mr. Jones, will you take the stand? [80]

HERBERT R. JONES

produced as a witness in behalf of the Plaintiff, having been first duly sworn by the Clerk, was examined and testified as follows:

The Court: Mr. Biggs, do you know Mr. Jones?

Mr. Biggs: Yes, sir.

The Court: Are you satisfied with his qualifications?

Mr. Biggs: I admit his qualifications, your Honor.

Direct Examination

By Mr. Dezendorf:

Q. Mr. Jones, you live here in Eugene?

A. Yes.

Q. You are a Forest Engineer?

A. That's right.

Q. While they have admitted your qualifications, I think it would be a little helpful if you would tell the Court the length of time you worked for Weyerhaeuser Timber Company and the various titles that you held and the areas in which you worked.

A. Well, I started in to work for Weyerhaeuser Timber Company in 1926 as a—on the survey party just as a chairman. And then I worked from various jobs—I have worked as a timber cruiser for Weyerhaeuser Timber Company and I have been a party chief. And the last job I had with them in Springfield, I was their logging engineer for the Springfield branch. [81]

(Testimony of Herbert R. Jones.)

Q. You worked early in your career up at Tacoma, did you not? A. That's right.

Q. When did you come down here?

A. I came down here in November, 1941.

Q. How long did you work for Weyerhaeuser here in this area?

A. From 1941 to 1951, with the exception that I was in the Army for three years—three and a half years.

Mr. Biggs: Excuse me, Mr. Jones. Did you say you came here in '31 or '41?

The Witness: '41.

Mr. Biggs: '41.

Q. (By Mr. Dezendorf): When did you leave Weyerhaeuser and open up your own shop?

A. July, '51.

Q. Are you the gentleman who with Mr. Paul Sanders, representing U. S. Plywood, made the joint cruise of the Seaver property?

A. I am.

Q. Now, Mr. Jones, are you familiar with the various methods of trading in timber which were in use in Lane County in 1942? A. Yes.

Q. And what were they?

A. Well, there was four methods—four, possibly five. But four methods of—well, one method was to—— [82]

The Court: One second. I don't see the relevancy of this. If Mr. Biggs' statement is correct that there is no disagreement between the seller and the buyer,

(Testimony of Herbert R. Jones.)

what difference would it make if there were a dozen different methods of dealing in timber?

Mr. Dezendorf: Well, if I might say this, your Honor, I know that all of us are familiar—intimately familiar with the way in which timber as a commodity is bought and sold. But there may be those in other courts who are not. And I thought it might be——

The Court: Well, I appreciate that. But I can't see the relevancy. And, in any event, I think it's anticipatory now.

What do you want to show by this witness?

Mr. Dezendorf: I want to show that there are four methods of——

The Court: All right. After you have shown that?

Mr. Dezendorf: All right. Then I wish to go into what merchantable timber he believes was on this property as of May 4, 1942, and various other phases as we go through the logging of the property.

The Court: Well, why do you need that preliminary statement in order to go into it?

Mr. Dezendorf: We will—I have got to get it into the record, I think, from some source. And I think he is [83] the most qualified man to do it.

The Court: All right.

Mr. Dezendorf: Because I am just afraid that someone not as familiar as we are may not know of the various ways of buying and selling timber that were in effect at that time.

(Testimony of Herbert R. Jones.)

The Court: Did you buy and sell timber for Weyerhaeuser Timber Company?

The Witness: I have bought and sold timber for myself and for Weyerhaeuser, both.

The Court: All right; go ahead.

Q. (By Mr. Dezendorf): Will you tell us what the four methods were?

A. There was one method was to sell the timber and—I mean sell the land and the timber that was growing on the land. And another method was to sell the timber and not the land. And a—there was another method that would sell the merchantable timber and not the land. And then in recent years they have sold the timber by diameter classes and not the land.

Q. Now, Mr. Jones, for the purposes of the following questions that I will ask you will you please accept this definition of merchantable timber: Merchantable timber is that timber which has a commercial value and can be economically and profitably harvested, taking into account its size, quality, location, accessibility, demand and market conditions? Now, do you have [84] an opinion, Mr. Jones, as to what timber on the Seaver property with which you are familiar was merchantable on May 4, 1942?

Mr. Biggs: I object to the question, if the Court please, because it imports an improper standard into the definition. Whether or not timber can be economically harvestable is not the test. And it is so stated. And all of the factors stated except that are factors of varying importance. It's not an inclusive

(Testimony of Herbert R. Jones.)

test and it's not binding on the particular parties to this transaction.

The Court: Well, I thought that the Supreme Court in *Daugherty vs. Harris Pine Mills* used the economic test as one of the standards.

Mr. Biggs: I thought they expressly overruled that, if the Court please. Go ahead.

Mr. Husband: Excuse me, your Honor. I would like to direct your attention, first to *Dahl* against *Crane*. That was one of the earlier cases in which the Court expressly rejected that concept. And, also, on rehearing in *Hughes* against *Heppner* the Court in answering Mr. Justice Warner's dissent stated that the Court did not hold as Mr. Justice Warner had indicated that economic feasibility of logging a tract had anything to do with merchantability.

The Court: Well, do you want to delete that particular test at this time? Then I am going to let you do it at a [85] subsequent time.

Mr. Dezendorf: I will be happy to. So, perhaps I had better restate it. Now, which one was it you objected to, Mr. Biggs?

Mr. Biggs: Economic feasibility and operability.

Mr. Dezendorf: I didn't talk about operability.

Mr. Biggs: I thought you used that also as part of your economic test?

Mr. Dezendorf: No.

Mr. Biggs: All right.

The Court: You mean merchantability does not depend upon the cost of taking timber out and its accessibility, and things of that kind?

(Testimony of Herbert R. Jones.)

Mr. Biggs: Those are all part of it, your Honor. But the fact is timber may be salable although it cannot at the moment be profitably or economically harvested.

The Court: At the moment.

Mr. Biggs: That's what he is talking about. That's the thing that they are—that his merchantability test is applied to.

The Court: All right. Delete that one standard at this time.

Mr. Dezendorf: If I knew which one it was, I would. That's my problem.

Mr. Biggs: If you didn't use economic—— [86]

Mr. Dezendorf: I did use economic.

The Court: Show him the definition.

Mr. Biggs: And can be economically and profitably harvested. I thought that's what he said, your Honor. And I object to that standard specifically.

Of course, my objection is a little broader. I think the test of merchantability is what the parties intended under all of the circumstances.

Mr. Dezendorf: Well, I know now what he is objecting to, so I can state it differently and then if it is not objectionable then we can go on to the next one.

Q. Mr. Jones, in answering my following questions will you please accept this definition of merchantable timber: Merchantable timber is that timber which has commercial value, taking into account its size, quality, location, accessibility, demand and market conditions?

(Testimony of Herbert R. Jones.)

The Court: All right. Now, ask him the question.

Mr. Biggs: I am sorry——

Mr. Dezendorf: Excuse me.

Mr. Biggs: Oh, excuse me.

Mr. Dezendorf: I thought the Court—did I hear an objection?

The Court: No. No. I just said ask him now the specific question. I am wondering whether the question is specific enough. [87]

Mr. Dezendorf: Well, I haven't asked the question yet.

The Court: Yes. But I heard you the last time.

Mr. Dezendorf: All right. Okeh.

The Court: I think it might be defective for want of specificity.

Mr. Dezendorf: I think I know what your Honor is raising.

Mr. Biggs: I don't want to interrupt now. The question, I anticipate, now, will be the same as before, and I want the record to show our objection to that definition—of that definition of merchantability.

The Court: You can have that objection. On what ground? I thought I sustained your objection the last time.

Mr. Biggs: You did, the specific one. My objection was just a little bit broader than that. I don't think a dictionary definition of merchantability is the definition applicable in the case. I think it must include also and as the cardinal principle the intention of the parties to the transaction as to what tim-

(Testimony of Herbert R. Jones.)

ber they regarded as merchantable and salable, considering——

The Court: Well, I am going to overrule the objection.

Mr. Biggs: All right.

The Court: Now, ask the first specific question.

Q. (By Mr. Dezendorf): Mr. Jones, having that definition of merchantable timber in mind, do you have an opinion as to what old-growth and second-growth fir and hemlock timber, if any, [88] standing on the Seaver tract involved on May 4, 1942, was merchantable? And the answer should be either Yes or No.

A. Yes.

Q. What is your opinion in that regard?

A. Well, my opinion is that in 1942 that the only merchantable timber would be the old-growth timber.

Q. Now, you made this cruise of the property with Mr. Sanders representing U. S. Plywood. At my request have you prepared a map and made computations to show the amount of timber that was taken off the Seaver property prior to June 24, 1950?

A. Yes, we have.

Mr. Dezendorf: May I ask that Exhibit 7 be handed to the witness, please?

(Whereupon the Crier handed the document to the witness.)

Mr. Dezendorf: May I approach the witness, your Honor?

The Court: Yes.

Q. (By Mr. Dezendorf): Now, will you explain

(Testimony of Herbert R. Jones.)

that exhibit to us? First, explain the part under the sheet. What is the property which is involved so far as the lines are concerned?

A. Well, we have drawn two sets of lines—three sets of lines here. One of the—one line, the green line, shows what we believe to be logged in 1949. And then we drew these other lines, these that are outlined in blue, which was logged in 1950. And this down in here (indicating) was logged in 1950. [89]

The yellow shows the farmland which never had any timber on it at all.

Q. Now, with respect to the penciled or dark lines, do they encircle the Seaver property itself?

A. They do. That's the boundary of the Seaver property.

Q. So that everything within the lines is the property that's involved in this action?

A. That's right.

Q. Now, can you give us by volume your calculation as to the amount of old-growth, second-growth, hemlock, etc., that was removed from the land prior to June 24, 1950?

Mr. Biggs: Now, if the Court please——

The Court: Don't answer the question yet.

Mr. Biggs: ——I would like—may I ask a question in aid of an objection?

The Court: Yes, you can ask him any question you want about how he got the information for the map.

Mr. Biggs: Yes. That's what I want.

(Testimony of Herbert R. Jones.)

Upon what information are you ascribing the volumes to year, Mr. Jones?

The Witness: Well, we made a stump count when Sanders and I worked on this.

Mr. Biggs: Yes.

The Witness: And we divided it into two-and-a-half-acre tracts and then we got the volume on each two-and-a-half-acre [90] tract.

Mr. Biggs: Yes.

The Witness: Then we superimposed this area that was logged over the map, and I took it from that.

Mr. Biggs: Upon what information did you base that as to when the logging occurred?

The Witness: From the information that was given to me by Mr. Seaver. Of course, I had no information as to exactly when the logging was——

Mr. Biggs: Yes. You couldn't tell that by your stump cruise?

The Witness: No.

Mr. Biggs: And you have no other information? That's hearsay information?

The Witness: That's right.

Mr. Biggs: That's the basis of my objection to the exhibit, your Honor.

The Court: Why do you have a witness testify as to volume of stumps when you have the actual records of the company? I don't understand that.

Do you say the company's records are fraudulent in this respect?

Mr. Dezendorf: No, I do not at all.

(Testimony of Herbert R. Jones.)

The Court: But this is so much more difficult to anticipate. [91]

Mr. Dezendorf: Well, your Honor has missed the point that we are trying to make, I believe. The company's records show that they only acquired 4,882,000 feet of timber and yet they cut off, according to the admitted joint cruise, over 11,000,000 feet of timber. So we have got to show how much was taken off before June 24, 1950, and how much was taken off thereafter.

The Court: Well, I don't understand why.

Mr. Dezendorf: Because, No. 1, the statute of limitations. We can't recover for anything that was taken off before June 24, 1950; therefore, we have got to show how much was taken off within the period of the statute of limitations before we can recover anything.

And, according to the company's records——

The Court: I thought all these fancy cruisers—and I am not talking about Mr. Jones alone—but you have Mr. Thomas who has been in my court all last week and Mr. Hoffman and all the expensive ones and they say that when they cruise an area it's nothing unusual to have two and three times the volume of the cruise. They thought it was the ordinary thing.

Mr. Dezendorf: Well, if you buy all the timber, that's all right. But here they bought merchantable timber.

The Court: But even on the estimates.

Mr. Dezendorf: Well, your Honor, we are doing

(Testimony of Herbert R. Jones.)

the best [92] we can to try to present the case the way we see it. I would like any suggestions you have as to what we should do, because I see no alternative but to try to find out how much we removed after the period during which the statute of limitations does not operate.

The Court: Won't the records of the defendant show that?

Mr. Dezendorf: They show everything removed in 1950 and nothing left.

The Court: Oh, no. That's not true.

Mr. Dezendorf: It is.

The Court: That's not true. They filed this affidavit that every company practically files. I would hate to examine all the records of the timber companies that you represent to find out whether they filed those.

Mr. Dezendorf: May I explain to you what their inventory and depletion records show? It's an admitted record now. That's the only record they have of what timber they had on their land and when they removed it.

Mr. Biggs: Here was the difficulty, your Honor. I must say this in aid of Mr. Dezendorf's position. It seems a little bit difficult to understand in the beginning, but when the Seavers' timber was taken in it was thrown into another area. It was never kept as the Seavers' tract specially. So we couldn't tell by years from the logs that were delivered to us [93] how much of those logs came from the Seaver tract and how much came from the other.

(Testimony of Herbert R. Jones.)

We thought that the best we could do is to estimate it by having two cruisers go out and attempt to agree on volume. And I have no objections to that. I am stipulating to the volume of their cruise. I was just objecting to the cruiser attempting to testify as to the time when these particular——

The Court: Well, I don't see any objection to that because that's based upon the assumptions made that the testimony of Mr. Seaver is correct.

Mr. Dezendorf: That's right.

The Court: So I didn't have any objection to that. I thought that was all right. I was under the impression that the company had records of the volume of timber removed from this tract and I couldn't see why he would want to estimate from stumps that which could be shown by the records. All right. Your objection is overruled. Let him testify.

Q. (By Mr. Dezendorf): Will you go ahead, please?

A. Well, let's see—we estimated there was 6,121,000 feet of timber removed in—before June 24, 1950.

Q. What species and types go into that total?

A. Well, there is old-growth fir, second-growth fir and hemlock.

Q. Well, will you give us the figures on each one?

A. Well, timber logged in 1949 is as follows: Old-growth [94] fir, 467,000 board feet; Second-growth fir, 94,000; Hemlock, 28,000. Timber logged

(Testimony of Herbert R. Jones.)

in 1950 prior to June 24th: Old-growth fir, 4,839,000; Second-growth fir, 576,000; and Hemlock, 117,000.

Mr. Dezendorf: Now, I have forgotten whether the Court admitted this exhibit or——

The Court: No. This exhibit was not admitted originally. But I am going to overrule the objection and admit it at this time.

Mr. Dezendorf: Thank you, your Honor.

The Clerk: 7?

The Court: Exhibit 7.

(At this point Plaintiff's Exhibit 7, previously marked for Identification, being a map showing area logged prior to June 24, 1950, with computation sheet attached, was thereupon received in evidence.)

Mr. Biggs: My objection really wouldn't go on the basis you are admitting it, your Honor. If they want to use it just to illustrate this testimony, that is all right. But I didn't want to be bound without objection to the accuracy of their figures since it is argumentative on their case. That's all.

Mr. Dezendorf: May I hand this exhibit to the witness and ask him about it? [95]

The Court: Go ahead. What number is it?

Mr. Dezendorf: I think it has been admitted. 8.

The Court: 8 is admitted.

Q. (By Mr. Dezendorf): Mr. Jones, will you just tell us how you prepared this Exhibit 8 so we will all understand it?

A. Well, this exhibit is the same outline of the

(Testimony of Herbert R. Jones.)

land of the Seaver property. And this is prepared from the affidavits. And when the affidavit showed that a certain area had been logged it was marked, it was divided into 40's. And this particular piece—affidavit says it was logged between January 1st, 1949, and January 1st, 1950. So that's the way we marked it.

Q. So, what you did was just take each affidavit and apply it to the area which it purported to cover and show the dates that were shown on the affidavit with respect to when the timber was removed; is that correct?

A. That's correct.

Q. Now, I am showing you Exhibit 9, Mr. Jones. Did you prepare it in response to my request for you to show the volume of timber that was removed from the Seaver property after the removal affidavits had been filed with respect to each particular piece?

A. That's right.

Q. Now, will you just explain to us what the brown circled areas mean? [96]

A. The brown circled areas are areas that were logged after the affidavits were filed that that particular area had been—there was nothing left on it.

Q. And the yellow area, again, circles the farmland?

A. Nothing on that; never was.

Q. Now, will you tell us the volumes that were removed of the various types of timber after the timber affidavits were filed with respect to each piece?

A. Well, you mean how much was logged in '53 and how much was logged in '55?

(Testimony of Herbert R. Jones.)

Q. Yes. What I am trying to get at is—well, let's get a total first and then you can break it down any way you want. How much timber was removed?

A. Well, there was a total——

Q. From the areas after the timber affidavits—or timber removal affidavits were filed.

A. 3,962,000.

Q. And what types was it broken down into?

A. Old-growth fir, second-growth fir, hemlock and cedar.

Q. What were the amounts of each?

A. Well, old-growth fir, 669,000. This is in 1953. Second-growth fir, 2,366,000; hemlock, 350,000; cedar, 7,000. And logged in '55 was second-growth fir, 488,000; and hemlock 82,000.

Mr. Dezendorf: We will offer that in evidence.

The Court: That's been admitted, too. [97]

Mr. Dezendorf: Very well.

(At this point Plaintiff's Exhibit 9, previously marked for Identification as a map showing logging after affidavits and date of logging, with computation sheet attached, was received in evidence.)

Q. (By Mr. Dezendorf): Now, Mr. Jones, bearing in mind, again, the definition of merchantable timber which I gave you immediately prior to the last question regarding merchantable timber, do you have an opinion as to how much merchantable old-growth and second-growth fir and hemlock timber

(Testimony of Herbert R. Jones.)

was standing on the property on June 24, 1950, which was merchantable as of May 4, 1942?

A. I can't give you the exact figure, but as to the old-growth in the Section 31 I think it was around seven or eight hundred thousand. But I can't remember exactly.

Q. Was there any other merchantable timber on the property on June 24, 1950, which was merchantable as of May 4, 1942, other than that that you have just mentioned?

A. No; nothing that was—based on 1942 merchantability it was not merchantable.

Q. I take it, then, that using the same merchantability test that it would be your judgment that everything that was removed from the property after June 24, 1950, except the old-growth was not merchantable on May 4, 1942; is that correct? [98]

A. That's correct.

Q. Now, you have not taken into account in determining merchantability the abandonment, if any, that might have occurred since filing of the timber affidavits, have you?

A. I can't—would you repeat that question?

Q. Yes. You haven't given any weight in arriving at your opinion to the fact that timber removal affidavits were filed?

A. Oh, no. I haven't. That doesn't enter into it. Mr. Dezendorf: I think you may examine.

(Testimony of Herbert R. Jones.)

Cross-Examination

By Mr. Biggs:

Q. Now, Mr. Jones, you went out and made a joint stump cruise with Mr. Sanders, the two of you agreeing on your methods and techniques, and so on, counting stumps and measuring sizes of trees and determining species? A. Yes.

Q. And you came up with the total volume of timber that had been removed from the Seaver tract; isn't that correct? A. That is correct.

Q. Do you know how much of that was old-growth and how much was second-growth and how much was hemlock, and so on?

A. Well, I do know, yes.

Q. You haven't any information—I mean you couldn't tell from your own examination when it came off, of course? [99]

A. Not too exactly, but we could tell when the 1955 logging came off. But the rest of it was pretty doubtful.

Q. Yes. So that the maps that you have drawn are just to illustrate Mr. Seaver's testimony in part that the area was logged at certain times according to his testimony and according to some affidavits; is that correct?

A. That's partly according to Mr. Seaver's testimony; although you can tell that the old-growth fir in the bottom was a great deal older than—I mean that was the original first logging. And I think that

(Testimony of Herbert R. Jones.)

old-growth area is pretty accurate, no matter whose testimony we are going to have.

Q. Well, I thought you said there was a considerable amount of it taken off after June 4th, 1950, of old-growth?

A. I didn't say a considerable amount; I said there was 700,000 out of about 6,000,000.

Q. Only 700,000? I didn't get your figure.

A. Yes.

Q. You say that's all of the old-growth that came off after June 4, 1950? June 24th, 1950?

A. I think that's right. I think that's what I said.

Q. Well, is that based on your observations or based on information given to you?

A. That was based on our observation. I know that is part of Section 31 that wasn't logged until 1953.

Q. Now, let me understand you. You can tell from what you [100] saw out on the ground yourself that there was only 700,000 of 6,000,000 feet of old-growth that came off after June 24th, 1950? Is that what you mean to say?

A. No; I can't tell. I'd say after January, 1950, 'cause I don't——

Q. I mean, you can't tell even within six months whether a tree has been cut eight years ago?

A. No, I can't. I can't within two years.

Q. Well, I wouldn't have thought so. Can you tell within three years?

A. Well, probably within two or three years.

(Testimony of Herbert R. Jones.)

Q. I see. So, then, actually your testimony as to the time of logging as set up in the charts in the main is taken from information that others have given you, is that correct?

A. In the main, yes. But we—I can still say that I know that that timber along the bottoms was taken off in 1949 and 1950.

Q. Because it was the first of the logging or because you can tell that it was nine years ago that it was taken off?

A. Because it was the first of the logging.

Q. Yes. If I understand your testimony correctly, what you are saying—your last answer to the merchantability question is the same as your first one that there was nothing that was merchantable on the Seaver tract according to the definition that Mr. Dezendorf gave you except old-growth [101] timber?

A. That's what I said.

Q. Yes. And upon what do you base that? Why was the old-growth, in other words, merchantable?

A. Because old-growth was a salable commodity and has been in Oregon for a great many years.

Q. What do you mean "salable"? You mean salable in stands or by log?

A. Both.

Q. Well, is that the test, then, in your mind?

A. Well, I think that's what I think is merchantable, yes.

Q. Well, that's what I want to know, if that's what you based it on.

Mr. Dezendorf: Just a minute. He based it on the definition that I gave him.

(Testimony of Herbert R. Jones.)

Mr. Biggs: This is cross-examination.

The Court: This is cross-examination. You go ahead.

Mr. Dezendorf: Yes.

Q. (By Mr. Biggs): The two elements that you are thinking of, then, is that in stand or by logs that timber had a sale in the sense that some buyer would pay value for it and some seller would sell it for value?

Mr. Dezendorf: I would have——

Q. (By Mr. Biggs): Is that correct?

Mr. Dezendorf: Excuse me before you answer. I would have [102] to object to any question whether it be cross-examination or otherwise which asks this man whether he based his answers——

The Court: Well, I am going to stop you right now because you can't start rehabilitating your witness. This is cross-examination. And I am going to order you to sit down and not say anything while this examination goes on because I think that this is perfectly permissible cross-examination. And you can't tell a witness how to answer the questions.

Mr. Dezendorf: I am not trying to tell the witness, your Honor. But I think I am entitled to make an objection, to raise——

The Court: All right. Your objection is noted. But the witness is going to answer these questions.

Mr. Dezendorf: I haven't had a chance to finish my objection.

The Court: Well, we are going to do it.

(Testimony of Herbert R. Jones.)

Will you step out of the room for a minute and close the door?

(At this point the witness left the courtroom in compliance with the Judge's request.)

The Court: All right. Go ahead.

Mr. Dezendorf: I object to a question to this witness which infers or suggests that in answering my questions as to what was merchantable, which were based upon a definition which I gave him, were based upon other considerations. The [103] point is this: I think I must preserve in this record the point as to whether merchantable timber—and the word “merchantable” is a word which the Court must define—or whether evidence other than the Court's definition of it may be used in the action.

Now, I don't know whether it is intentional or not, but I have a feeling from the last two questions that Mr. Biggs asked this witness that he was trying to confuse him and ask him what his own definition of merchantable timber may be as distinct from the definition which I gave him.

Now, if that is what he is trying to get at I must preserve my objection to that question, the legal question which I think is one of the fundamental questions in the case.

The Court: Well, your objection is noted. All right. Call the witness back.

(At this point the witness entered the courtroom and resumed the witness stand.)

(Testimony of Herbert R. Jones.)

The Court: Do you want to ask the question over again?

Mr. Biggs: Yes.

The Court: All right.

Q. (By Mr. Biggs): In answering Mr. Dezen-dorf's question considering old-growth only was merchantable, you did that on the basis that you thought it was salable, is that correct?

A. Salable in 1942? [104]

Q. In 1942. A. Yes, I think that's correct.

Q. Yes. The element of salability is the thing that influenced your judgment as to whether the old-growth was merchantable and the second-growth was not, is that correct? A. That's right.

Q. Yes. So that if second-growth timber would bring a price on the market by a seller who was willing to sell and a buyer who was willing to buy, you would say, then, that the second-growth timber was merchantable because it was salable, isn't that correct? A. That's right.

Q. Yes. The test throughout is salability, is it not? A. That's right.

Q. Yes. Isn't it common practice in this area, and wasn't it in 1942 and is yet, to sell fir timber by stands and not by trees?

A. Well, yes. They don't sell it by the tree very often.

Q. No. When you buy a stand of fir timber you take what is on the stand? A. That's right.

Mr. Dezen-dorf: May I interpose an objection?

The Court: Yes. Go ahead.

(Testimony of Herbert R. Jones.)

Mr. Dezendorf: I would object to the question for the reason and upon the ground that we are dealing here with a [105] contract which deals with merchantable timber, not just plain timber, and the distinction is between whether you are buying all the timber or just the merchantable timber, or what.

Mr. Biggs: Well, if you are buying—I am sorry.

The Court: Your objection is noted and overruled.

Mr. Biggs: Yes.

Q. The contract on which you are buying merchantable old-growth and merchantable second-growth and merchantable hemlock, you are buying timber of that species as salable timber, are you not?

A. That's right.

Mr. Biggs: Yes.

The Court: Will you tell us right now what is the definition of old-growth and second-growth as it pertains to the timber in this area?

The Witness: Well, second-growth timber in this particular area we are speaking of is usually from 40 years to 110. 110.

Mr. Biggs: How old?

The Court: 110. And old-growth is everything older.

The Witness: Well old-growth—there is quite a spread. Old-growth is usually from about 200 years on. There is an in-between growth we call red fir or bastard growth that runs from about 110 to 200.

The Court: And what do they call third-growth over here? [107]

(Testimony of Herbert R. Jones.)

The Witness: Well, what third-growth is is what we are calling second-growth today.

The Court: Oh.

The Witness: It's a local term usually in the Coos Bay area.

The Court: What is the other word for third-growth?

The Witness: Red fir.

The Court: Go ahead.

Mr. Dezendorf: I didn't get that answer.

The Court: Red fir.

Q. (By Mr. Biggs): Do they sometimes call old-growth yellow fir, too?

A. Old-growth yellow fir is a very old fir as a rule.

The Court: They don't use the word third-growth in this area; it's usually in the Coos Bay area; isn't that right?

The Witness: Coos Bay area is the first time I became acquainted with it.

Q. (By Mr. Biggs): Of course, you were buying for Weyerhaeuser until 1951, is that correct?

A. Well, I wasn't doing much buying for Weyerhaeuser. I was their logging engineer. I bought some small amounts for Weyerhaeuser, but I was not their timber buyer or anything.

Q. Of course, Weyerhaeuser was a very large timber owner during those years and still is. It's the largest timber owner in this area. We all know—that's true, isn't it? [107] A. That's right.

(Testimony of Herbert R. Jones.)

Q. It was interested primarily in old-growth stands where it could get old-growth stands?

A. That's all they were interested in.

Q. All they were interested in. Do you mean to say, though, that you did not know of any operations in exclusively second—in second-growth timber in 1942, Mr. Jones?

A. Not in this area.

Q. How close to this area?

A. Well, I knew of quite a few in Washington. But I didn't—I wasn't familiar with any in Oregon in 1942.

Q. Yes. Were you looking the country over, examining the potentials of second-growth timber sales and advising yourself on what second-growth operations were being conducted and what second-growth timber stands were being sold?

A. No.

Q. So that you can't say that you are an expert and don't pretend to be an expert on the market for second-growth timber in Lane County in 1942?

A. No, I am not.

Q. Oh. You are not?

A. I wouldn't—wouldn't say I was an expert on timber in 1942, in Lane County. I had only been here a year.

Q. Oh. I thought that was what Counsel was proposing, you as an expert on that—on timber sales in Lane County and [108] merchantability in Lane County, in 1942.

A. No.

Q. I see. You don't claim to be an expert, then, and don't have a reliable opinion about those matters?

A. No; I don't claim to be an expert.

(Testimony of Herbert R. Jones.)

Mr. Biggs: That's all.

The Court: Go ahead.

Mr. Dezendorf: That's all?

The Court: Yes.

Redirect Examination

By Mr. Dezendorf:

Q. Mr. Jones, did you make an inspection of the records of the Forest Service office at Mapleton to determine when the first sales of second-growth timber were recorded in that area in its office?

A. I did.

Q. When did you find the first sale of second-growth timber in this area?

The Court: Is that Government timber?

Mr. Dezendorf: Yes.

The Court: Oh. Yes. Go ahead.

Mr. Dezendorf: Forest Service.

The Witness: 1943.

Q. (By Mr. Dezendorf): And that was the first one, is that [109] correct?

A. That was the first one that we could find.

Q. Now, when did Weyerhaeuser make its first purchase of second-growth in this particular area here?

A. Well, Weyerhaeuser has never purchased any second-growth in this area without purchasing the land with it. But they started to buy second-growth timber in around 1948 and '49. They had purchased one purchase in about 1944, but very little was made 'til about 1948.

Q. Now, in your own experience as distinct from

(Testimony of Herbert R. Jones.)

Weyerhaeuser's and on your own account did you every buy any second-growth timber here in Oregon?

A. Yes.

Q. When did you buy yours?

A. I bought mine in 1946.

Q. In what area did you buy it?

A. In the Coos Bay area.

Q. How much did you pay for it?

A. I bought 10,000,000 feet for \$15,000.

Q. Do you know whether that particular block had been for sale for some time before you bought it?

A. As I understand it, it had been for sale for two or three years and no one would—had approached them about it.

Q. What was its situation with respect to accessibility to market or roads or water? [110]

A. Well, I would say it was very accessible because right on tidewater—

Q. Now, Mr. Jones, what was the age of the hemlock on the Seaver property?

A. Well, I think the hemlock was about 20 to 30 years older than the fir in most cases. It was about 100 years old.

Q. So that that would fall within a second-growth classification?

A. It grew in after the fire.

Q. So that that would be second-growth; is that right?

A. That would be second-growth, too, yes.

Q. And the only real old-growth was the old-growth fir, is that correct?

(Testimony of Herbert R. Jones.)

A. That's correct.

Q. So that you really have four species or divisions there; you have the old-growth fir, second-growth fir, second-growth hemlock, and cedar; is that correct? A. That's correct.

Q. Do you have any explanation for the fact that the old-growth was in the bottoms in the Seaver area?

A. Well, that's usually where the fire skips it, in these large forest fires, runs from over the top of the ridge and usually the bottoms are saved. If anything is salvaged at all in a fire, why, it's the timber in the bottoms.

Q. And you could see from your stump cruise out there that [111] the old-growth on the Seaver property was in the bottoms; is that correct?

A. That's correct.

Q. Now, Mr. Jones, in answering my questions with respect to merchantability on direct, did you have in mind the definition of merchantable timber which I gave you?

A. In answering Mr. Biggs' questions, you mean?

Q. Answering mine. A. Oh, yes.

Q. When I was questioning did you accept the definition which I gave you? A. Yes.

Mr. Dezendorf: That's all.

Recross-Examination

By Mr. Biggs:

Q. What was that definition?

A. Do I have to repeat that definition?

(Testimony of Herbert R. Jones.)

Q. Well, I think if it was important as a consideration in your mind you should know what he was talking about if it differs from what you told me the element of merchantability was.

A. Well, merchantability is determined by the quality and the size and the accessibility and the—I'd say that's—of the timber. [112]

Q. But the ultimate test is whether it's salable?

A. That's true.

The Court: What did you say?

The Witness: I said yes. It has to be salable, too.

Q. (By Mr. Biggs): Well, salable is the test, isn't it, of merchantability?

Mr. Dezendorf: There I would object because he is asking this witness' opinion of his own as to what merchantability is. And I think that's not proper in this case, with the contract that we are dealing with.

The Court: Your objection is overruled.

Mr. Biggs: Yes.

Q. Isn't it, Mr. Jones?

A. You said that salability is merchantability?

Q. Yes. It's the ultimate test of merchantability, is it not?

A. Well, it is and it isn't. I would say it was one of the ultimate——

Q. But so far as what the practices were here and what the merchantability was and what people were accepting and selling with respect to second-growth in 1942, you don't know? A. No.

(Testimony of Herbert R. Jones.)

Q. Now, you said that you were buying timber for Weyerhaeuser in 1941, 1942?

A. No; I didn't say I was buying any for Weyerhaeuser in [113] 1941 to '42.

Q. I'm sorry. Just small areas, I believe you said you were logging?

A. And not in 1941 and '42.

Q. They were buying, I believe, some timber, were they, between '41 and '51? A. Yes.

Q. And you say they were buying only old-growth stands. Well, now, that included second-growth, did it not?

A. Oh, yes. Of course, they buy four or five thousand acres. There is bound to be some second-growth in there.

Q. And they expected to include the second-growth in this old-growth when they bought a stand of timber?

Mr. Dezendorf: I object. They're not buying on a merchantability basis; they are buying land.

Mr. Biggs: We are going to find out.

Mr. Dezendorf: You are suggesting to him that that's what they were doing.

The Court: This is cross-examination. Go ahead.

Q. (By Mr. Biggs): They were buying it with the stand, were they not?

A. Buying timber stand and land with it.

Q. Yes. And land with it? A. Uh-huh.

Q. And on the old-growth the second-growth would be not [114] completely contiguous; it would

(Testimony of Herbert R. Jones.)

be included in the same stand to some extent, would it not? A. To some extent, yes.

Q. Yes. And you logged second-growth, did you not? A. What was that?

Q. And you logged second-growth with the old-growth? A. In 1942.

Q. Yes. Weyerhaeuser, as they came to a stand, they take the second-growth along with the old-growth in so far as the second-growth there, would they not?

A. Well, the second-growth doesn't grow right in with the old growth. It usually grows in a stand by itself.

Q. Sometimes there is a mixture and you have to take it, is that correct?

A. Yes. There is a few trees scattered in some-times all right.

Q. Yes. Would you take those?

A. Why, sure.

Q. The second-growth? A. Yes.

Q. What would you do with them?

A. We would log it in with the old-growth.

Q. Take them in and manufacture them?

A. Yes.

Q. You had a multiple-purpose mill, did you? I mean, you [115] had a mill geared to cut with a pony rig on it so that you—or a gang saw or something so that you could use the second-growth timber as well as the old-growth timber in your mill?

A. They didn't use the second-growth at a profit, but they brought it in with the old-growth.

(Testimony of Herbert R. Jones.)

Q. Well, whether they used it for profit or not they manufactured it and sold it, didn't they?

A. I presume they sold it.

Q. Yes. And at that time they were doing no—Weyerhaeuser was doing no manufacturing of second—no logging of second-growth other than as it was incidental to the old-growth, is that right?

A. I would say that. Of course, they didn't even have a mill here in 1942. I don't know what Weyerhaeuser was doing here.

We didn't have any mill here in '42—1942. Didn't build a mill 'til 1948.

Q. I don't quite understand what your duties were, then, between '41 and '51.

A. Well, I came down here in 1941 to do all the preliminary engineering for this mill that was built in 1946 and '47.

Q. Oh. You were not, then, in the woods working for them in the woods during that time?

A. Yes, I was in the woods, but I was—had gone from 1942 to '45 because I was in the Army.

Q. I see. But from—I see. '41 to '45 you weren't buying [116] timber and you weren't—you were trying to build a plant?

The Court: He was in the Army.

Mr. Biggs: No. '41 to—

The Court: '41 to '45.

Mr. Biggs: '42 to '45. One year.

Q. You were only here a year, then, till after the war? A. That's right.

(Testimony of Herbert R. Jones.)

Q. Yes. And the hemlock also grows in with the old-growth, too, doesn't it?

A. It definitely grows in with the old-growth.

Q. And you take the hemlock out with the old-growth, do you not?

A. That's right.

Q. Yes. That was the practice in Washington and Oregon as far as you knew it in 1942, was it?

A. It was.

Q. Yes. Frequently timber stands are sold and very profitably that are wholly inaccessible, are they not?

A. I don't know whether they're very profitable or not. They're sold.

Q. I say, they are sold at a good price?

A. Yes.

Q. A valuable price, even though they are inaccessible?

A. That's right.

Q. The logging, of course, to await the construction of a [117] road to them?

A. Yes. That's right.

Q. Yes. So you wouldn't say a stand of timber that simply was inaccessible on that account was not merchantable, would you, either in Washington, Oregon or——

A. It depends on what the stand was. I would say a stand of second-growth in 1942 would be unmerchantable because nobody would have bought it.

Q. Even though it was mixed in with some good old-growth?

A. Well, there wouldn't be a stand of second-growth mixed in with some good old-growth.

(Testimony of Herbert R. Jones.)

Q. I mean, on the same tract?

A. Well, if there was a—yes, it would be—it might be included with some old-growth that was on the same——

Q. Supposing somebody did buy it and did say merchantable second-growth and bought it, thought enough of it to name it——

A. I didn't get that question.

Q. Supposing somebody did buy the merchantable old-growth and second-growth? If there was a sale made on that basis that would be merchantable within the definition that you prefer here, as you have given us on your cross-examination, isn't that correct?

A. Well, the old-growth would be merchantable. The second-growth wouldn't necessarily be [118] merchantable.

Q. Well, if a man bought and paid for it, would that make it merchantable?

A. It would be in one sense, but it wouldn't be merchantable in the sense that the—that it would be—could be marketed at a profit.

Q. You're talking about the trees—individual trees of second-growth might not at that time be manufactured at a profit, is that what you are talking about?

A. Well, the whole stand of second-growth couldn't have been manufactured at a profit.

Q. Although the stand could be sold as a valuable asset?

A. Not as a—not as a stand of second-growth.

(Testimony of Herbert R. Jones.)

It could be sold if it was sold along with some old-growth.

Q. Well, if a man pays \$7,000 for a stand of timber in 1942 and he describes it as merchantable old-growth, second-growth and hemlock, don't you think he was intending to acquire the old-growth and the second-growth and the hemlock?

A. I don't think——

Mr. Dezendorf: Just a moment. I object to the question.

Mr. Biggs: That's argumentative and I will withdraw the question.

The Court: Yes. I am going to sustain the objection because it is argumentative. Any further questions?

Mr. Biggs: That's all.

Mr. Dezendorf: Not at this time. [119]

The Court: All right. Does the plaintiff rest, now?

Mr. Dezendorf: Does your Honor wish to continue on tonight?

The Court: Yes. Go ahead.

Mr. Dezendorf: We will rest at this point, then.

(Witness excused.)

(Plaintiff rests.)

Mr. Biggs: Well, I have got to mark exhibits and everything else. I would like to take a little time.

The Court: All right. You can mark the exhibits. I will tell you what we will do, then: Why

don't you mark the exhibits and talk to Mr. Dezen-dorf about it?

How about starting tomorrow at 9:30? Is that too late?

Mr. Biggs: That's fine, your Honor.

The Court: All right. How many witnesses do you have?

Mr. Biggs: Well, about eight or nine, your Honor.

The Court: We will be finished tomorrow.

Mr. Biggs: Maybe. Maybe. There is a possibility.

Mr. Dezen-dorf: Well, if the Court please, I assumed that when you say we are going to be finished tomorrow that we will [120] have a chance to rebut—

The Court: Oh, sure.

Mr. Dezen-dorf: —whatever testimony—

The Court: How many witnesses are you going to have on rebuttal?

Mr. Dezen-dorf: I don't know what his witnesses are going to testify to.

Mr. Biggs: I think you know generally what they are going to testify to.

The Court: I am not going to cut you off. I was just anticipating that probably we would be through. Do you want to start at 9:00? It's all right with me.

Mr. Biggs: Actually, our testimony will be a little longer than—I mean the witnesses might be a little longer than these witnesses have been, your Honor. We will do the best we can.

The Court: All right. Good. I assume that you want Mr. Jones to remain here. Is he going to testify again for you?

Mr. Dezendorf: It could be.

The Court: Yes. Well, you come back tomorrow.

Recess until the morning at 9:30.

(At 5:25 p.m. the Court adjourned.) [121]

Morning Session

(At 9:30 a.m. Court reconvened pursuant to last evening's adjournment.)

Mr. Biggs: No. 51 is a vicinity map. The Judge looked at it. I don't know whether it was admitted or not.

Mr. Dezendorf: No objection.

Mr. Biggs: No objection. 52.

Mr. Dezendorf: No objection.

Mr. Biggs: 53. Maybe you haven't seen this.

Mr. Dezendorf: No objection.

Mr. Biggs: Okeh. 54.

Mr. Dezendorf: No objection.

Mr. Biggs: 55.

Mr. Dezendorf: We have an objection to that.

The Court: All right.

Mr. Dezendorf: Do you wish it stated?

The Court: No. Anything you object to I am not going to let in. That's all right now.

Mr. Biggs: 56.

Mr. Dezendorf: No objection.

Mr. Biggs: 57.

Mr. Dezendorf: There may be an objection to that, based upon the fact that it's a combination of hearsay and the witness'—— [122]

Mr. Biggs: Same objection. 58?

Mr. Dezendorf: Same objection.

Mr. Biggs: 59?

Mr. Dezendorf: No objection.

Mr. Biggs: 60?

Mr. Dezendorf: No objection.

Mr. Biggs: 61?

Mr. Dezendorf: We object to that.

Mr. Biggs: 62?

Mr. Dezendorf: Object to that.

Mr. Biggs: 63?

Mr. Dezendorf: No objection.

Mr. Biggs: 64?

Mr. Dezendorf: No objection.

Mr. Biggs: 65?

The Clerk: It's in.

Mr. Dezendorf: We have one question I would like to raise there at this time on that. Mr. Seaver believes that two of the checks that are in there are payments for logs that he sold not from this property but some others. So that I want to have a chance to see the stubs that go with those.

Mr. Biggs: All right.

The Court: We will pass that.

Mr. Biggs: 66?

Mr. Dezendorf: No objection. [123]

Mr. Biggs: 67?

Mr. Dezendorf: No objection.

Mr. Biggs: 68?

Mr. Dezendorf: We object to that on—well, I won't say why.

The Clerk: It's already in.

The Court: Whenever he objects to anything——

The Clerk: No. I mean yesterday.

The Court: What?

The Clerk: 68, 69, 72 and 73 were received.

The Court: Then they are received. 68 is in. 69 is in.

Mr. Biggs: Yes. That's right.

The Court: And 70 is in.

Mr. Biggs: That's right. That's right.

The Court: Are you offering 71?

Mr. Biggs: Yes, your Honor.

The Court: All right.

Mr. Biggs: And 72, I think, is in. And 73 is in. Isn't that correct, Mr. Clerk? and 74, I think you put in, didn't you, Mr. Dezendorf?

Mr. Dezendorf: We put in the originals and your 74 is just photostatic copies of that.

Mr. Biggs: We don't care anything about that. Copies of exhibits. All right. In. Then 75 is a stereoscopic [124] picture which I showed you last night.

Mr. Dezendorf: We have no objection to the picture as such, but I am informed that the device with which you look at the map does not present a true picture because it only operates in one dimension, so that it makes the hills and gullies look much steeper because it does not extend the area out to its true proportion in comparison with the

downward view, so that it does not give a correct representation.

Mr. Biggs: I think that's valid, your Honor. I talked with Mr.—what's his name?—I mean you have to make some allowance for the fact that the map is distorted by reason of having looked at it while it's for illustrative purposes and the distortion is about 25 per cent. And I asked him what that meant on an angle and he said there is none.

The Court: Have you got a machine that will work?

Mr. Biggs: We have got a machine.

The Court: Have you got a machine that will show it accurately?

Mr. Biggs: I don't think there is any made. Is there? All the stereoscopes in this area distort it a little bit to a minor distortion.

The Court: Can you look at the pictures without a machine?

Mr. Dezendorf: It's exactly the same thing, only to apply the machine to—— [125]

The Court: Well, knowing of the distortion I am going to look at it anyway.

Mr. Biggs: Yes. I think it would be helpful to give some idea of the ravine.

Mr. Dezendorf: That raises another question which we might consider.

The Court: Go ahead.

Mr. Dezendorf: And that is in that event—in the event the Court does look at it no matter how you discount it an appellate court would not be in a position to take a similar view or make any dis-

count because the machine, apparently, is not going to be introduced or to accompany the exhibit.

The Court: Well, they can rent a machine down there.

Mr. Biggs: We will make that one available.

Mr. Dezendorf: Well, I still object on that ground.

The Court: All right. I have noted your objection.

Mr. Biggs: And 76?

The Court: What is it?

Mr. Biggs: You haven't got that on there. Those are harvesting permits.

Mr. Husband: Yes, he has.

Mr. Biggs: Oh. He has? Harvesting permits in addition to those you offered yesterday.

Mr. Dezendorf: I haven't seen them. I would like to see them if I may. [126]

Mr. Biggs: Surely.

Mr. Dezendorf: Mr. Biggs, I notice that the second one in here says that U. S. Plywood is the owner of the land. Do you think it's applicable to this?

Mr. Biggs: 53?

Mr. Dezendorf: It says U. S. Plywood is the owner of the land.

The Court: They are not going to claim ownership by reason of that permit.

Mr. Dezendorf: These have long descriptions in them. I wonder if we could have a little time to check them?

The Court: You check them during the noon hour.

Mr. Dezendorf: May we reserve our objection on them?

The Court: Oh, yes.

(At this point all exhibits mentioned above were received in evidence except those to which Mr. Dezendorf noted an objection.)

Mr. Biggs: Now, if the Court please, we will call Mr. Sanders to the stand. [127]

PAUL SANDERS

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Biggs:

Q. Will you state your full name?

A. Paul M. Sanders.

Q. Where do you reside, Mr. Sanders?

A. Portland, Oregon.

Q. What is your occupation?

A. Consulting Forester.

Q. How long have you been engaged in that occupation?

A. I have been engaged as a Consulting Forester since July of 1954.

Q. What is——

The Court: Didn't you testify before me last week?

(Testimony of Paul Sanders.)

The Witness: Two weeks ago, sir.

The Court: He was one of those fancy foresters that I was telling you about.

Mr. Biggs: He was hurt that you didn't refer to him as high-priced, your Honor.

Q. What is a Consulting Forester, Mr. Sanders?

A. A professional forester available to clients for projects.

Q. And what does that include, all phases of forestry?

A. The general term would include all phases of forestry, sir. [128] Each Consulting Forester will tend to specialize in different fields.

Q. What field or fields have you specialized in, particularly, if any?

A. Well, my primary field is a Consulting Forester and as a professional forester retained by various companies on salaried jobs through the years. The field primarily has had to do with inventory of forest land, management of forest properties of old-growth, young-growth, and reproduction lands and appraisals thereof.

Q. What is your educational background, Mr. Sanders?

A. Graduate of the College of Forestry of the University of Washington.

Q. What year? A. 1939.

Q. And you have been actively engaged as a Consulting Forester at all times since then?

A. Not as a Consulting Forester. As a professional forester. Until July of 1954 I worked for

(Testimony of Paul Sanders.)

various companies and organizations as a professional forester.

Q. At the present time you maintain your own office? A. That's right.

Q. Operating independently, is that correct?

A. That's right.

Q. Did you at the request of the United States Plywood make [129] a cruise of the property in question, a stump cruise of the Seaver tract?

A. I did, sir.

Q. In that connection did you go over the entire area?

A. I personally was over the entire area. I was not personally on all of the strip and sample measurements on the stump cruise. The job was done under my personal supervision and instruction, and part of it I was on personally myself. But I have been over the Seaver property, yes.

Q. And was that cruise made jointly with Mr. Jones? A. It was.

Q. Who was retained by the plaintiff in this case; is that correct?

A. That's my understanding, yes..

Q. From data obtained from your observations or from the observations of your crew who reported to you, have you made various maps and charts of the area for use in the trial of this case, Mr. Sanders? A. Yes, we have, sir.

Q. I will ask you to examine Exhibit 52 and state if that is a map prepared under your supervision?

(Testimony of Paul Sanders.)

A. This is a map prepared under my supervision and direction, Mr. Biggs. This map—the basic information for this map does not come directly from the joint stump cruise. This is based on the—this is a map showing the forest cover prior to [130] any cuttings on the property.

Q. And based upon what information?

A. Based upon aerial photographs that were taken in 1949.

Q. Just briefly, what does the map purport to show? You state “Forest Cover Before Cutting.” Does that mean the types and species of timber and the relative location of them? A. Yes, sir.

Q. Is it a contour map? A. No, sir.

Q. Now, Mr. Sanders, are you familiar with Exhibit 75, being a stereoscopic picture, aerial photograph, of the Seaver tract? A. Yes, sir.

Q. By whom was that prepared?

A. The stereoscopic exhibit was prepared by H. G. Chickering, Consulting Photogrammetrist.

Q. Of Eugene? A. Of Eugene, yes.

Q. Is the area shown on the stereoscopic picture the same area as the area shown on your map, Exhibit 52? A. Yes, it is.

Mr. Biggs: Now, I would like to ask the Court to examine the stereoscopic map.

And I would like, if possible, to have you, while he is examining that, relate features on the stereographic map to the flat map. It will be in the nature of a kind of a [131] commentary. We can't see the stereoscopic map because only one person can look

(Testimony of Paul Sanders.)

through it at a time. Maybe you would rather look through it.

The Witness: I think I might suggest that the Judge could look at it through the stereoscope and then we could discuss it.

The Court: I am willing.

Mr. Dezendorf: You understand it's subject to my objection.

The Court: The map isn't, but just the use of the machine.

Mr. Dezendorf: That's correct. The map is identical to Exhibit 3, which is already in.

The Court: All right.

Mr. Biggs: Now, the object is as long as this thing is down you have the two pictures in focus and you can move it back and forth to cover it. It's the area marked out in yellow. That is the Seaver tract. You will be looking at that through both of these lenses (indicating).

The Witness: I would suggest you leave your glasses on. That's the easiest way.

Mr. Biggs: It will take a few seconds to get used to it before these things come up. It will take just a minute to adjust your eyes.

(At this point discussion was held off the record regarding the viewing of the map.) [132]

The Court: It is exaggerated.

Mr. Biggs: Yes.

Mr. Dezendorf: Quite a little.

The Court: Do you have a contour map here, a

(Testimony of Paul Sanders.)

flat contour map? I think I am going to strike this exhibit.

Mr. Biggs: Mark that as 74 and would you note that?

The Clerk: 77, wouldn't it be?

Mr. Biggs: 77.

(At this point a contour map was marked for Identification as Defendant's Exhibit 77.)

Mr. Biggs: Put the map on the easel and tell the Court about it. Any objection to this going in evidence?

Mr. Dezendorf: None.

Mr. Biggs: If you could bring that right out there where the Court could see it——

The Court: Where all of us can see it.

Mr. Biggs: Yes, where everybody can see it. Now, if you will stand on this side with the pointer, Mr. Sanders, and if you will just describe, point out the lines and the area, what the color stands for and tell the Court as accurately as you can what the general topograph of the country is.

The Court: Let Mr. Jones sit in the jury box if he wants to. You have got a better view. Anybody else who wants to go over there may. All right. Go ahead. [133]

Q. (By Mr. Biggs): I notice it's colored. What do the colors stand for, first?

A. The colors represent the various classifications of vegetative cover on the ground. As I mentioned in answer to one of your questions, Mr.

(Testimony of Paul Sanders.)

Biggs, the map—the detail as to the cover—forest cover, vegetative cover on the ground, was taken from aerial photographs which were taken in 1949, before any logging occurred.

The forest cover detail is an interpretation from those aerial photographs.

Q. To what extent was it confirmed by observation in reference with the crews?

A. It was of no more—minor in detail that you would expect on ground check. It conformed very closely to what we saw on the stump cruise.

The red areas—this color (indicating) would show on the map—were areas that were predominantly, almost exclusively old-growth timber, stands of old-growth timber, old-growth Douglas Fir. The blue areas—plain blue with no cross-hatch over them—are areas that are predominantly second-growth Douglas Fir.

Q. If there is cross-hatching in there, it's not obvious from where I am, Mr. Sanders. Point it out.

A. Well, I will point out the areas that were primarily, exclusively second-growth Douglas Fir stands. This area through [134] here is a solid blue, no cross-hatching (indicating).

The Court: What does the cross-hatching mean?

Mr. Biggs: Mixed, intermingled. Excuse me.

Q. Explain that next one. What is cross-hatching?

A. I talked about solid old-growth stands, solid

(Testimony of Paul Sanders.)

second-growth stands and then a mixture of second-growth with old-growth.

The Court: All right.

The Witness: So the blue areas that show up are either pure stands of second-growth or stands of second growth with mixtures of old-growth fir therein. And the areas that have the mixtures of fir show in the cross-hatch.

One of the corrections that would be made to this map, based upon the field study—we made no attempt to make this other than an interpretation from the aerial photos—but one of the corrections would be that this drainage creek here that shows as a mixture of second-growth with scattered old-growth is very predominantly old-growth, should probably be more truly colored in this red.

Now, that's a type of thing that has to be checked on the ground in an aerial photo interpretation.

The green areas classified as reproduction, that would be young trees up to, oh, 10, 20, 25 years old; seedlings and also small second-growth which at the time the aerial photo was taken was about 30 years old. So the green areas is stuff [135] an inch high to small second-growth up to about 40 years old. That is this color here (indicating). Generally on the ridge tops and running some down the side slopes.

The brown areas are classified generally as hardwood. There will be mixtures of alder and maple, primarily.

The yellow color, the brindle, is grass, brush and fields, primarily the bottom pastureland.

(Testimony of Paul Sanders.)

Q. (By Mr. Biggs): How much land is there on the whole tract, Mr. Sanders?

A. It shows in the exhibit. 413 acres, I believe, is the figure. 413-point-something.

Q. How much of that is meadow and how much of it is fir and hemlock timber?

A. I have that acreage tabulated in one of your exhibits. I'd much rather refresh my mind from that, if I may.

The Court: Do you want to interrogate him about the map, Mr. Dezendorf, or do you want to do it later?

Mr. Dezendorf: Later.

The Court: All right. Go ahead.

Q. (By Mr. Biggs): Now, if you can point out generally to the Court on that the topography of the area——

A. The main—this whole area lays on, generally, the divide between the Siuslaw River, which is up here (indicating) and the Smith River, which is way down here (indicating).

The Court: "Up here" refers to Siuslaw, being north? [136]

The Witness: Yes. This being north (indicating) and this is south (indicating). This main drainage, for instance, which heads here.

Q. (By Mr. Biggs): Now, you are indicating the east side of the map. If you will use directions, it will help.

A. Just where I am pointing, Mr. Biggs, on the east side of the map (indicating).

(Testimony of Paul Sanders.)

Q. East side of the tract. The point is, a record is being made of this and "here" and "there" don't mean much to the record.

The Court: I know it is north when you point up, but the Court of Appeals might not know.

The Witness: This stream that runs generally east—through the east here of 40's on the property is running north along the direction of my pointing and—oh, pardon me. Let me start over again. This stream I am talking about that runs through the east here of 40's starts at the north end of the property and is draining southerly. It goes out to the north fork of the Smith River, which flows southwesterly into the Smith River as does also this stream about—approximately through the center of the property. And this stream also here.

Q. (By Mr. Biggs): Coming in generally from the northwest of the property?

A. Coming in generally from the northwest. Then to the—[137] from the north edge of the property is the divide between the Siuslaw River to the north and the Smith River to the south.

Actually, the property itself is on the divide, but the streams that head in the property generally trace—drain to the south towards the Smith River with the Siuslaw drainage starting at the north edge of the tract.

The topography within the tract is characterized by this being primary bottom approximately in the center of the tract running east and west, which

(Testimony of Paul Sanders.)

was the grazing and pastureland that has been referred to.

Q. That's the yellow area?

A. That is the yellow area on the map. And by fairly short side streams generally running north and south, either from north to south or from south to north, and draining into the middle of the property.

The slopes up from the side streams are quite steep, fairly short, but the elevations will range from 1000 feet, which is approximately the elevation here in the field according to the contour map—approximately 1000 feet up to about 1500 feet at the top of these ridges (indicating).

The streams, as I say, run generally north and south through the property. This drainage here (indicating), another side stream here running north and south, another one here coming in from the northwest and running south. And then from the south edge of the property running north there are [138] short streams that drain in towards the center of the property.

Now, between each of these streams there are ridges such as indicated on the map here, this being a ridge (indicating).

Q. You can't say "here." It doesn't mean anything. Indicating on the map from where?

A. It's predom—

Q. From the center of the—

A. The predominant ridge starts in the center of Section 31 and runs generally southerly approximately down the north-south center line of

(Testimony of Paul Sanders.)

the section about two, three hundred feet west of the north-south center line of the section, this ridge (indicating) that starts at the center of Section 31.

Q. So that aside from the meadowland, just generally speaking, the topography is canyons and ridges, is that correct? A. That is correct.

Q. Yes.

A. With short, steep slopes; typical coast country topography.

The Court: And is there a considerable amount of timber on the ridges and slopes?

The Witness: The bulk of the timber is on the lower slopes and in the bottoms, but the ridges as shown—indicated by the colors on the map, your brown and your green colors being reproduction-size timber or hardwoods and brush and they [139] are generally on the ridges or on the upper slopes.

The Court: Where is the old-Growth timber generally?

The Witness: Generally, this piece (indicating).

Mr. Biggs: The Court means by topography reference.

The Witness: In reference to topography, mainly in the bottoms.

The Court: And the second-growth?

The Witness: Some in the bottoms but also running up the side slopes. That pattern develops, of course, as a result of the old fire history through this particular area and generally through the coast country.

(Testimony of Paul Sanders.)

Q. (By Mr. Biggs): What is that? Just amplify it a little bit so that we will get it clear in mind.

A. In this particular area the fire from which this blue—the stands on the blue area, the second-growth stands, started or after which the stands started, that fire must have occurred, oh, 80 to 90 years ago. The second-growth stands are generally 70 to 75 or a little—70 to 75 years old.

A fire went through the country at that time, burned off pretty clean the areas that show on the map as pure second growth. Areas on the map that show mixtures of second-growth and old-growth, the fire was lighter. It skipped—maybe skipped a patch of a dozen old-growth trees or skipped a tree here and a tree there of the old-growth. And the areas that show now as old-growth timber would have been almost [139A] entirely skipped by the fire. They were down in the bottom and the fire would skip from one ridge to the other and leave a pocket of old-growth in the bottom.

Then the seed from the old-growth trees that were left after the fire restocked the burned area and from that grew our present 70 to 75-year-old second-growth stand.

There have also been other fires in the area from which result these younger second-growth and reproduction stands.

Q. Would you tell the Court just briefly, Mr. Sanders, how a fire stand replenishes itself or how

(Testimony of Paul Sanders.)

it grows with reference to location of second-growth stands to old-growth stands, and so on?

A. The primary thing, I think, within the term we are talking as far as the Douglas Fir stand is concerned——

Mr. Biggs: Take the witness stand.

(Whereupon the witness did as requested.)

The Witness: ——is that a Douglas Fir stand is even-aged. Generally a Douglas Fir tree will not grow within its own shade. In other words, within an existing stand of Douglas Fir, a well-stocked stand, there will not be young trees coming up underneath young Douglas Fir. For a fir stand to get established it is the general rule and it applies in this area—for a fir stand to become established it is required that the ground be fairly well cleaned of trees, either through an old fire, [140] through logging, windfall, or something that pretty generally removes the stand of timber.

Then from adjacent seed sources seed comes into that essentially bare ground and you have a stand of Douglas Fir that starts that is practically all of the same age. That process of seed-getting on the land and germinating and the trees starting in a particular area may spread over, oh, ten years. But by the time the stand gets to be 70, 80 years old, such as what we are talking about, the difference in age is insignificant. Essentially you have got an even-aged homogeneous stand of timber.

Q. Even though the sizes of trees within that stand may vary?

(Testimony of Paul Sanders.)

A. The sizes of the trees may vary greatly, whereas the age may be exactly the same.

Q. Why is that?

A. Because of the characteristics of trees growing in an even-aged stand whereby you have some trees that are dominants, dominant trees which, through inherent characteristics or through the particular spot on the ground they happen to be located, are able to grow taller and faster, reach up and get more of the light and get a greater share of the water that is available. And they grow to be bigger trees. The biggest trees. And then you have co-dominants and intermediate trees that are about the average and you have suppressed trees [141] that for some reason or other were not able to grow quite so fast and got left behind.

Q. So, while fir timber ordinarily grows an even-aged stand, it has considerable variation among the trees as to the dimension and size; is that correct?

A. Yes.

Q. All right. Now, when you spoke of intermingled second-growth and old-growth as shown on the map——

A. Uh-huh.

Q. —how is that explained by what you just said, that second-growth doesn't grow with old-growth?

A. Well, your Douglas Fir will not reproduce and grow under a solid stand of Douglas Fir or any other timber where it's a solid stand to the extent that the ground is pretty well shaded. The type of mingling that I referred to here and existed on

(Testimony of Paul Sanders.)

this property resulted from the fact that the fire that went through that country would burn clean a patch as big as half this room and then it might—in a little minor depression might—in the ground might skip another patch of about the same size of old-growth. Actually, within that little clump of old-growth you wouldn't have reproduction coming up underneath but along the edges of it where the fire did clean the ground you would have the young trees coming in and growing up to be second-growth.

Q. That's what, then, was the situation on the slopes where [142] you have shown on your map intermingled old-growth and second-growth; is that correct?

A. That is correct.

Q. Now, when timber is harvested in a tract comparable to this and in accordance with the best forestry practices—I am speaking of fir timber—what method of logging is used with respect to how the area is cleaned, if it is logged spot by spot or tract by tract, or is it selective in that particular trees are taken out of the particular areas and other trees left in those same areas?

Mr. Dezendorf: I think I would have to object to that unless it is just a general observation that has no reference to this property. Because we don't as yet and, perhaps, may never have any accurate information as to how this property was logged with respect to dates that are precise enough to be of too much help.

Mr. Biggs. I have asked that particular ques-

(Testimony of Paul Sanders.)

tion based on the provisions of the contract which require the purchaser of the timber to cut it or harvest the timber in accordance with the best forestry practices. So I am asking now from this witness as an expert his opinion as to what the best forestry practices were. And I will limit that from 1942 on to the present time.

The Witness: Yes.

The Court: All right. The objection is overruled. [143]

The Witness: In a tract of this general nature, particularly with the topography that was involved, and particularly in 1942, the common standard and best practice, method of logging such an area would be by high-lead cable systems of logging, which is essentially a—the proper system—let me start over.

The high-lead system of logging is basically a system under which the particular area being logged is clear-cut. In other words, cables go out, pull in the logs, and anything that is standing——

Q. (By Mr. Biggs): Go out from what? Go out from what?

A. Go out from the spar tree located, say, on the road. Lead out from the spar tree and then the logs are pulled in to the spar tree by cable system by powered machinery, donkey engines located on the road. Under that system all trees—it's a common practice to fall all trees on the particular setting that is being logged to a particular loading point.

Q. Regardless of size and dimension?

(Testimony of Paul Sanders.)

A. Generally so. I was going to add to that the fact that some trees at a particular time may not be felled particularly because they are—because of size or some other reason. But those trees in a high-lead logging would expect to be knocked down in the logging through the action of the cable yarding. What isn't felled gets knocked down.

Q. Just generally, let's take an average strip. How large [144] an area are we talking about on a spar pole setting—on one spar-pole setting?

A. Well, an average economic and practical yarding distance; that is, the yarding—the distance from the spar tree to the back end of the setting, the maximum distance that a log will be yarded in would be anywhere from 800 to 1,000 feet. The endeavor, of course, is to log as big an area as is practical consistent with the topography and the timber types, as much of an area to a single setting where the spar tree is rigged at considerable expense as is possible.

So the ideal situation, which is very seldom attained—but the ideal system a logging engineer is always looking for is the situation where he can set up his spar tree at a good landing, a place where logs can be conveniently handled and loaded on trucks where he has a perfect circle around that setting from which he can draw the perfect timber.

Q. Of 800 to 1,000 feet?

A. Yarding distance, yes.

Q. What? A. Yes. That's correct.

(Testimony of Paul Sanders.)

Q. Yes. Then as to the trees that aren't actually felled by the fallers, how are they disposed of? You say they are knocked down in the logging?

A. Many trees in high-lead logging, for one reason or another—more so in earlier trees than later trees—but the trees that [145] are knocked down and not taken to the—not hauled out of the woods—are left on the ground

Q. Now, what is required in good forestry practice with respect to cleaning up the area that has been logged out, cleaning it up with respect to debris and snags, and so on?

A. The State law requires—and it is also generally good forestry practice on clear-cut logging—requires annual burning of the slash, all the debris, residual material, that is left on the ground after logging. Requires the burning of the slash.

Q. Well, if a small tree not felled or not otherwise knocked down remains, is it good practice to cut that tree down so that it can be dried out and burned with the slash?

A. In high-lead logging it may not be the best practice if it could be avoided. But the practice, of course, is conditioned by practical conditions. And in high-lead logging it is extremely difficult to avoid knocking down the type of tree we are talking about.

The Court: Isn't that the old practice they used to call busheling?

The Witness: Busheling refers to contract falling.

(Testimony of Paul Sanders.)

The Court: And that's where—and when they did busheling, because they did it economically, as cheaply as they could, they used to use a high lead and knock out all the small trees. Wasn't that the basis for the legislation and [146] the suggested forest practices which would save the small trees?

Mr. Biggs: I was going to come to that. Go ahead. Answer the question of the judge.

The Witness: I think, your Honor, that that description would more particularly fit the pine area where you have an uneven-aged stand within a small area, a quarter of an acre. You will have little trees that are just starting and old-growth trees three, four hundred years old, and everything in between. And the topography conditions, the nature of the stand, are such that your pine logging is, by the nature of it—by the nature of the topography and the stand, the pine logging is essentially a tree-selection system. And the topography lends itself to that because the area can be logged with wheeled vehicles.

In the old days a horse and a—high-wheeled carts were seen. Now Cats are used.

But the Conservation Act that you refer to in the pine area specifically provides that trees below, I believe it is, 16 inches in diameter be left. In the Douglas Fir region, in recognition of the fact that fir is an even-aged stand, because of that and because of the topography, high-lead logging is commonly accepted as the practice.

The Conservation Act basically—it has alterna-

(Testimony of Paul Sanders.)

tives—but basically provided for provision for seed source by [147] leaving uncut a percentage of a 40. In other words, leaving a portion of the stand within each area uncut rather than individual trees.

Now, you do have certainly many situations in a fir forest where, because of the topography and the nature of the timber the ground is logged by tractors—and under some conditions—where under certain circumstances where just a part of the stand will be taken out.

For some reason it is practical to leave individual seed trees, much as in pine. But the basic system in Western Oregon, and it would apply certainly in an area such as this, is to provide for the Conservation Act requirements of leaving a seed source by leaving an uncut portion of the stand.

The Court: I think you testified previously that there is no minimum as far as fir is concerned.

The Witness: That is right.

The Court: It's only in the pine that there is a minimum?

The Witness: A diameter limit. The minimums in the fir refer to a percentage of the area that has to be left uncut. In addition to that, where seed trees do fit in fir practice there are specifications on the seed trees in the fir which have changed a good deal. I couldn't quote them now. Essentially, it is the endeavor in the Act to insure that a tree, and the fir that is left as a seed tree, is

(Testimony of Paul Sanders.)

honestly capable of producing seed. It calls for a tree of a certain size and [148] a certain height and percentage of ground, something that is capable of actually producing seed.

But it's not the strict diameter limit that is the basis for the Pine Conservation Act.

Mr. Biggs: Would you say, generally, then, in the fir area after a tract has been logged in accordance with good forestry practice, you have clean areas—perfectly clean with nothing on them with, then, some seed or reforestry sections which have been untouched completely?

A. That is the normal situation, yes.

Q. A small percentage of that tract left untouched will reseed the whole area if the whole area is clean and available to reseed seed; is that correct?

A. That is correct.

Q. But if in the fir area you left particular trees in a stand for seeding, the young stuff wouldn't grow up in that stand, anyway, as I understand it, in a fir area—wouldn't grow up within the stand that's already established?

A. Well, it would depend on how many trees were left.

Q. Yes. All right. Was this an area that was adapted to high-lead logging or to tractor logging in the main, Mr. Sanders?

A. In the main, high-lead logging.

Mr. Biggs: If the Court please, I have much other data that at some time in the case I would want to put in through this witness. But at this

time I intended to show just as far [149] as we have gone to give your Honor a little background of the area.

I would like now to withdraw him and with the privilege of——

The Court: You can do anything you want.

Mr. Biggs: ——recalling him at a later time.

The Court: Do you want to withhold cross-examination?

Mr. Dezendorf: I think it would be productive in some saving of time.

Mr. Biggs: All right. I want to accommodate some other witnesses, if the Court please.

(Witness temporarily excused.)

Mr. Biggs: Mr. Warlick, will you take the [150] stand?

MARVIN T. WARLICK

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

Mr. Biggs: If you will take the witness stand, Mr. Warlick.

Direct Examination

By Mr. Biggs:

The Court: Off the record.

(Discussion held off record.)

Q. (By Mr. Biggs): Will you state your residence, Mr. Warlick?

A. At the moment I am living at Portland.

(Testimony of Marvin T. Warlick.)

Q. How long have you lived in Portland?

A. Since August—the last of August, last year.

Q. What is your occupation presently?

A. Present time I am Deputy Real Estate Commissioner, State of Oregon.

Q. State of Oregon? A. Yes.

Q. How long have you held that office?

A. Since the last of August.

Q. Your home prior to your accepting the appointment in Portland was in Eugene, Oregon, was it? A. Eugene, Oregon.

Q. How long were you a resident of Lane County before you [151] moved to Portland, Mr. Warlick?

A. From October, 1930, until August, last year.

Q. What has been your occupation during those years in the main?

A. Fifteen and a half years, beginning with '31, I was Business Manager of the Eugene Hospital and Clinic. Then in '46, I believe it was, I went into the wholesale lumber business for myself.

Q. How long were you in the wholesale lumber business?

A. At the present date I am still interested in it.

Q. Yes. Prior to your actually going into the wholesale lumber business, had you done a little dealing in timber in Lane County?

A. Oh, yes.

Q. Now, Mr. Warlick, are you the Marvin T.

(Testimony of Marvin T. Warlick.)

Warlick who was a party to a contract which has been identified in this case as Plaintiff's Exhibit No. 1, the contract between Marvin T. Warlick and Thelma Warlick and Siuslaw Forest Timber Products Company—— A. We had——

Q. ——for the sale of some timber to——

A. Yes. We entered into such a contract.

Q. Pardon?

A. We did enter into such a contract.

Q. You heard the testimony of Mr. Sanders who just preceded [152] you on the stand?

A. I did.

Q. With respect to a certain tract of land which was referred to here in the record as the Seaver Tract, was it that land from—which you owned in 1942? A. That's right.

Q. When had you acquired that land, Mr. Warlick?

A. It seems to me that I acquired it in 1935.

Q. Yes. For what use—what use did you make of it? For what purpose did you acquire it?

A. I bought it primarily as a retreat for my family. We were advised to come from Texas here by the doctors on account of my wife's health, and they insisted that I get her in a very quiet, preferably a damp climate, and away from anything that we would call excitement. And I bought the place for that purpose.

Q. What can you say generally about the remoteness and inaccessibility of the area?

A. It was extremely remote when I bought it.

(Testimony of Marvin T. Warlick.)

It was necessary to cross the river at Florence and go around by—oh, I forget the little place. Anyhow, up Fiddle Creek and over Sunset Mountain and down to Sweet Creek, and then from that over in there about 40 or 50 miles of one-way mountain road.

Q. How far, actually, does the land lie from Mapleton, and in what direction? [153]

A. I think it was 12 miles, if I am not mistaken. About 12 miles.

Q. As the crow flies, that is? A. Right.

Q. You held that land, then, from '35 until 1942? A. I believe that's right, yes.

Q. You heard Mr. Sanders' testimony with respect to the forest cover on the place. Does that conform generally to your observation?

A. Right.

Q. Were you thoroughly familiar with the tract by 1942; I mean, have you been to every part of the tract?

A. Yes. I had had occasion several different times to go through every bit of it.

Q. Was there any cedar, to your knowledge, on that tract at all?

Mr. Dezendorf: Well, just a minute.

Mr. Biggs: I don't know about that. I don't care about that.

Mr. Dezendorf: It's admitted in the case that a certain amount of cedar was cut.

Mr. Biggs: I withdraw that.

Q. In 1942 did you sell the timber on this property by the contract that you have identified here,

(Testimony of Marvin T. Warlick.)

Exhibit No. 1? A. I did. [154]

Q. To whom did you sell that, Mr. Warlick?

A. Well, without looking at the contract, it was—I think it was Mr. Gonyea.

Q. Well, it's Siuslaw Forest Products?

A. Now, I don't know whether it was the company or Mr. Gonyea in person.

Q. Tell me, if you will, with whom you negotiated that purchase? A. Sherman Davidson.

Q. Who is Mr. Davidson? When did you become acquainted with him?

A. I became acquainted with Mr. Davidson when he first came into the Mapleton area with the idea of putting up a mill. At that particular time my work at the hospital was getting hospital contracts. In other words, an agreement whereby for so much per month we provided hospitalization for employees.

I met Mr. Davidson before the mill was built and secured a contract from him for the operation.

Q. Yes.

A. And we became friends over the years since then.

Q. And do you know at that time whether he was acquiring—or what areas he was acquiring timber in?

A. Well, at the time I first approached him he was not particularly anxious to buy timber anywhere. They had acquired the holdings there some—as I remember it, about 50,000 acres [155] that

(Testimony of Marvin T. Warlick.)

they had acquired when they started to build the mill.

Q. Now, when you say "they," do you refer to others than Mr. Davidson?

A. Well, I think he was associated with other men, like Mr. Gonyea, and one or two others. I can't recall their names right now. It was the Siuslaw Forest Products Company.

Q. They had organized the Siuslaw Forest Products Company? A. Yes.

Q. And was Siuslaw Forest Products Company the company that was putting up the mill at Mapleton? A. Yes.

Q. All right. You say, then, when you became acquainted with him you didn't think he was interested in buying timber. Did you approach him with the idea of selling your timber?

A. I did.

Q. Why did you want to sell your timber, Mr.—

A. Well, there were several reasons. One of them that I—I was a little bit interested in running for Congress at that time and needed some money. I think Don remembers the occasion. And that was one of the incentives to get some money for a campaign; I thought I would sell the timber.

Another was that I had two children just ready for the University and I needed money for that purpose, also.

Q. Yes. You spoke of wanting to sell the timber. What about the land? [156]

(Testimony of Marvin T. Warlick.)

A. I did not want to sell the land. I wanted to keep that for the family to spend their summers on.

Q. Yes. And what were your negotiations with Mr. Davidson and—that finally led to the contract? What was your agreement and how did it—was it worked out?

Mr. Dezendorf: If the Court please, at this point we would have to object to any testimony which would attempt to vary the terms of the contract or to explain what might have been the intention of either this gentleman or anyone else for the reason and upon the ground that what is merchantable timber is a matter of some definiteness. The word was used in the contract. The intentions of the parties with respect to what they may have thought with respect to it are immaterial and may not be introduced because there is no ambiguity in the contract in that regard.

The Court: I am going to overrule the objection on the authority of the Oregon cases which say that the word “merchantable” is not an unambiguous term but must be construed in the light of the other provisions of the contract and the understanding of the parties.

However, I do want to say this: That last night I considered the whole question of reformation of the contract and I came to the conclusion that this might not be possible in a case of this kind even if both Mr. Warlick and the Siuslaw Forest Products Company had an understanding that the [157]

(Testimony of Marvin T. Warlick.)

Siuslaw Forest Products Company cut every tree on the tract, because intervening rights have come in. But I believe that in spite of that fact that this testimony is admissible to explain what is merchantable.

Mr. Biggs: That's right, your Honor. I had wanted to say in that connection, and I will make my position perfectly clear here, because I have considered the very thing that your Honor has in mind, it is our position, just as your Honor has expressed it, that the word "merchantability" is a word which must reflect the intention of the parties in the locality, under all of the circumstances at the time. The Court says it imports an ambiguity which justifies the admission of extrinsic evidence. Now, if there is any phase of that or any interpretation that Counsel contends for and which we can agree with, which your Honor hasn't indicated he would agree with—but if there is that which would actually frustrate the purpose of this contract and the intention of these parties and it had to be so ruled we would then most certainly request reformation to make the contract reflect the intention of the parties. And in this particular case we would contend, as the evidence already shows, that no intervening rights would be impaired thereby because they do not stand in a position of bona fide purchasers for value. The testimony now shows that both Mr. Tucker and Mr. Seaver knew that when they acquired the property that they [158]

(Testimony of Marvin T. Warlick.)

were not acquiring any timber. They were put on notice.

The Court: Well, that may be right. I don't know.

Mr. Biggs: But I mean I am reserving that thought in mind if there eventuates a serious problem about this thing from any of the language of the Supreme Court. We think not, but we certainly don't think that if our evidence is as we anticipate it to be that the purpose of the contract should be frustrated.

The Court: I want to also make it perfectly clear that when I overruled Mr. Dezendorf's objection it was no surprise to him because even prior to the time I heard any evidence or knew very much about the case I told him exactly what I was going to do.

I am going to listen to all the evidence, but I want you to preserve your record.

Mr. Dezendorf: Surely. I think perhaps I should amplify my statement a little bit in view of Counsel's statement, just to point out the reason for my objection so your Honor will be, perhaps, more fully advised.

It is our position that the word "merchantable" as used in this contract is just as definite as is old-growth, second-growth, or fir or hemlock, and that being as definite there may not be any evidence of intention of the parties with respect to what they meant when they said that.

For instance, we think the situation would be

(Testimony of Marvin T. Warlick.)

the [159] same if Mr. Warlick were asked what he meant by fir and tried to include cedar within fir, which would, obviously, not be proper. And we feel very strongly that based upon the decisions of the Supreme Court to this point that where merchantable timber is used as such and there is no ambiguity or any provision in the contract that indicates that that meant merchantable during the life of the contract, that no evidence of intention can come in to try to construe or indicate what the parties meant when they said "merchantable timber."

The Court: All right. Restate your question now.

Mr. Biggs: I have forgotten just what one I stopped on. I will, though.

The Court: You were asking him about the negotiations which led up to the consummation of the contract.

Mr. Biggs: Oh, yes.

Q. You stated, I believe, that you had met Mr. Davidson out there in connection with another business matter. Did you proposed to him the sale of your timber, Mr. Warlick? A. Yes.

Q. Now, what was his situation, then, as you learned it from him? What was his attitude toward acquiring the timber?

Mr. Dezendorf: Same objection.

The Court: So you won't have to do this all the time I am going to give you a running exception to this whole line [160] of interrogation.

(Testimony of Marvin T. Warlick.)

Mr. Dezendorf: All right.

Q. (By Mr. Biggs): Do you understand the question?

A. Well, maybe you had better ask it again.

Q. All right. You proposed the sale of the timber to Mr. Davidson, I presume, because at that time his tract—the timber that he had acquired had reached your tract; is that correct?

A. That's right.

Q. Timber that he owned bordered on your tract? A. (Witness nods head.)

Q. When you proposed it to him, what was his attitude at that time towards the acquisition of your tract, Mr. Warlick?

A. I wasn't—I might say this: I was not too familiar with the financial setup of the Siuslaw Lumber Company as to who was the head. I thought at that time Mr. Davidson was and I am not sure now but what he was at that particular time.

And when I first asked him if he would be interested in buying my timber he said, "Not at the present time because of the lack of cash"; that he would be interested in buying it at some future time, but at that particular time he would not be in a position to do so.

Q. About when was that that you first proposed this purchase to him?

A. Oh, it must have been six, seven, eight months previous to [161] the time that we actually made the deal.

(Testimony of Marvin T. Warlick.)

Q. Were there further negotiations, then, and discussions with him?

A. Oh, we talked over it many times. He and the family were over when we were in the log cabin there at week ends. They would come over and we would visit all Sunday and we talked several times about what we might do with the timber. And I kept insisting that he try to sell it for me or try to buy it.

Q. And, then, what kind of an understanding did that eventuate in, if any, Mr. Warlick?

A. Well, eventually—at first I asked him to cruise it and see how much timber there was on it. And he said he would spend some time and cruise the old timber and wasn't too particularly interested in the second growth.

Q. Yes.

A. I insisted that I wouldn't sell the old timber unless he took the second growth.

Q. Yes. Why was that?

A. Well, my experience in my hospital work—I was in these logging camps continuously every day most every week, and I saw how the small timber was knocked down and destroyed. There was no use trying to sell the old growth and keep the second because there would be no second to keep.

Q. In the process of logging old growth you figured the [162] second growth would be pretty well cleaned out anyway?

A. That's right.

Q. All right.

(Testimony of Marvin T. Warlick.)

A. After he cruised it I thought there was more timber there and I employed a cruiser and he came up with a little more timber. But still Mr. Davidson was not interested in buying it.

Finally I made him a proposition. I asked him what he would give me for the timber on the place and we—after negotiations for a number of days or weeks we then entered into the contract.

Q. What was the price that you agreed upon?

A. Well, I haven't seen that contract in twelve—

Mr. Biggs: You can take a look at it.

The Witness: 10,000 or 7,500, something like that.

Mr. Biggs: This is a copy of it I started to show to you. It's a photostated or verified copy.

Q. 7,000 is what it reflects?

A. Yes. That's right. 7,000. Right.

Q. Yes. What amount of timber did your cruise show you had on that, Mr. Warlick?

A. Well, I think there was, perhaps, two million more.

Q. Do you know what the total was as you recall it?

A. My memory was that it was around 7,500.

Q. I am not talking about the money. [163]

A. 7,000,500.

Q. Oh. Seven and a half million?

A. Seven and a half million.

Q. Seven and a half million feet. Do you know who your cruiser was?

A. Yes.

(Testimony of Marvin T. Warlick.)

Q. Who was that?

A. A friend of mine out on the Lorane Highway, Mr. Brooks, I believe his name is.

Q. Brooks? A. Yes.

Q. Did you have a copy of his cruise?

A. Oh, yes.

Q. Do you have a copy of his cruise?

A. Well, it might be in my papers. I have had no occasion to look them up.

Q. I am surprised. I assumed that a cruise had been made by Mr. Davidson from Hooker from whom we have tried to get it.

A. It was Hooker instead of Brooks. Mr. Hooker. I know right where he lives out on the Lorane Highway. And he cruised it for me.

Q. Well, have you tried to get a copy of that cruise from him since?

A. Well, he gave me two copies.

Q. And you do have a copy of it? [164]

A. Somewhere in my files, yes.

Q. If you can find it for us, you would be giving us information we have been looking all over for. Would you try to find that for us?

A. I would have to search my papers.

Mr. Dezendorf: If the Court please, I would have to move to strike the witness' recollection of what he thought the cruise showed in view of the fact that it now develops there is a document which will show which would be the best evidence. He might otherwise be misled.

Mr. Biggs: I would be very happy to do that,

(Testimony of Marvin T. Warlick.)

with the understanding that if we can't locate it we would like his testimony to stand. I will say in that connection, your Honor, I thought I had asked Mr. Warlick. I certainly asked Mr. Davidson to try to locate the old cruise. And we have been unable to locate any cruise at all on that tract. So if you can find it for us, Mr. Warlick, we would like very much to have you do it and we will be happy to reserve an exhibit number in the pretrial order.

The Court: I would like to ask him one question.

Mr. Biggs: Yes.

The Court: Did the cruise indicate the volume of old growth and second growth?

The Witness: Your Honor, as I remember it, there was some 6,000 feet of old growth—6,000,000 feet of old growth and [165] the balance of it was second growth.

Mr. Dezendorf: I would make the same objection.

The Court: All right.

Mr. Dezendorf: And request the same ruling to your Honor's question and the answer.

The Court: Well, it's understood that if the cruise is located obviously the cruise and not these statements would be the testimony that would be relevant and admissible. And I would strike the testimony of this witness with reference to his remembrance of the terms of the cruise.

Mr. Dezendorf: May I make this suggestion be-

(Testimony of Marvin T. Warlick.)

cause I think perhaps I am right? Is it not proper to strike the testimony now? Because this is the defendant's witness. So that unless they produce the written cruise the evidence is out.

Mr. Biggs: I don't know why you say that.

The Court: Where do you live? You live, Mr. Warlick, in Portland now?

The Witness: Right.

The Court: Have you completed this testimony?

Mr. Biggs: No; I have not, your Honor. No.

The Court: Are you going to go into the cruise any further?

Mr. Biggs: Oh. You mean on that subject? I have, yes. Yes, I certainly object to—— [166]

The Court: Well, I am going to take your motion to strike under advisement and we will consider it if the cruise is found.

Mr. Biggs: And I will ask the witness in open court, if the Court please, if he will be kind enough to make a search of his files in an effort to locate that?

The Witness: I will be glad to.

Mr. Biggs: And to report it to me during the progress of the trial as soon as you can find it or whether you can find it?

Q. Will you do that, Mr. Warlick?

A. Be glad to.

Q. Yes. Was the price related directly by units or otherwise to the timber purchase?

A. It was not.

Q. It was simply a negotiated price that you

(Testimony of Marvin T. Warlick.)

finally agreed upon? A. Right.

Q. Now, what was your intention with respect to the extensiveness of the timber sold; that is, the quantity of the timber sold by this contract, Mr. Warlick?

Mr. Dezendorf: I assume my objection runs——

The Court: Yes. Your objection goes to all of this witness' testimony.

Mr. Dezendorf: Yes. [167]

The Witness: My understanding was that he was buying all of the timber on the place.

Q. (By Mr. Biggs): You did not intend to reserve any timber to yourself, is that correct?

A. There was no timber reserved. And after we had decided how we would do it, I said, "What about firewood? We want firewood for the couple that I kept up there in the log house and for our own log house." And Mr. Davidson said, "If you need firewood, you are perfectly welcome to go out and get all you want. If you need a pole to fix the fence or make a chicken house or anything like that, just go ahead and help yourself."

Mr. Dezendorf: I would have to add a further objection now in view of the witness' answer, which is that the witness is attempting by this testimony to vary not only the merchantability feature or explain his intention with respect to it, but he is trying to vary the whole terms of the whole contract, which is improper.

Mr. Biggs: No. I am offering that only for the

(Testimony of Marvin T. Warlick.)

purpose of showing the state of his mind and his intention at the time, your Honor. We are not——

The Court: All right. Objection is overruled. Objection is overruled.

Q. (By Mr. Biggs): Was there any discussion with respect to the time in which the timber was to be removed, Mr. Warlick? A. Yes. [168]

Mr. Dezendorf: An additional objection there, that he is attempting to vary the terms of the contract.

Mr. Biggs: I want to show them——

Mr. Dezendorf: Additional——

Mr. Biggs: I am not trying to show that there was any difference with respect to the parties but why, if I may, the time of 25 years was given in the contract.

The Court: All right.

Q. (By Mr. Biggs): The contract provides, Mr. Warlick, that the—the Siuslaw Forest Products had 20 years within which to commence cutting and an additional five years, if necessary, to complete; a 25-year cutting contract. Now, why was that time or period determined upon?

A. I asked Mr. Davidson how soon did he think they would log it off; he said that would entirely depend on the demand of the mill and the roads—wherever they ran their roads as to when they got into it. But he said since they had a lot of timber between there and the mill they would take it first and it would probably be some time—and I insisted that it would suit me better if I had a con-

(Testimony of Marvin T. Warlick.)

tract where they would agree not to take any cutting at all for 25 years because I wanted to reserve it as a retreat for the family.

Q. You wanted the use of the timber for your purposes, but you didn't—

A. I wanted to keep it as it was, a primitive place, a very [169] beautiful place, and I wanted to keep it that way. And he reminded me, and I knew it would happen, that when they did log it, it would look like a cyclone had gone through it and everything would be in terrible shape as far as the beauty of the place was concerned. And I insisted that they take as much time as they would to log it. The longer, the better it would suit me.

Q. Now, subsequently, did you dispose of the land itself, Mr. Warlick?

A. A year, maybe 18 months later; after the boy and girl got into the University they were not able to go over on week ends or holidays, and things like that, with me and I found that I was going over alone.

Q. Going over to this tract alone?

A. Going over to the cabin, as we call it, the ranch. And so we were also wanting to buy a home. As I said, we had bought the home and needed a little more money and I decided then I would sell the land.

Q. You said a year or 18 months?

A. Yes.

Q. I believe the record shows you actually sold it within less time than that.

(Testimony of Marvin T. Warlick.)

A. I don't remember.

Q. The same year, October, '42.

A. I don't remember the exact time. It was the next summer [170] or next fall, or something like that.

Q. To whom did you sell it?

A. Sold it to the Tucker brothers from California.

Q. Do you remember the consideration?

A. I believe it was \$3,000.

Mr. Dezendorf: Well, I think the records would be the best evidence if he is working on his memory all the time.

Mr. Biggs: All right. Well, I don't know that the record shows what it is.

Mr. Dezendorf: I move it be stricken.

Mr. Biggs: I don't know that the record shows what it is.

The Court: Well, I don't think that the stamp in and of itself was evidence of what was paid—is evidence in and of itself of what was paid. And unless they do have the contract I am going to permit the witness to testify.

Mr. Dezendorf: Well, may we not add to our objection, then, that the witness' testimony is not the best evidence?

The Witness: I would say that it was either three thousand or thirty-five hundred.

The Court: Wait a minute.

Mr. Biggs: Just a minute.

The Court: What is the best evidence?

(Testimony of Marvin T. Warlick.)

Mr. Dezendorf: The best evidence is either the contract or any receipt or documents that may have been exchanged as [171] the consideration.

Q. (By Mr. Biggs): Was there a receipt, if you recall it? Do you have in your possession any record of that transaction?

A. No; I don't have any records of that transaction.

Q. At all, Mr. Warlick? It was sold to him on a contract or by deed? A. Cash.

Q. Cash. So that a deed was delivered and there was no contract, is that correct?

A. That's right.

The Court: Well, you might show him the document. It might refresh his memory.

Mr. Biggs: I have here a photostatic copy of a deed. I will ask him to examine that to refresh his memory.

Q. Does that refresh your recollection?

A. Not as to the exact amount. It says, "Ten Dollars and other valuable consideration."

Q. The stamp is \$3.50?

The Court: It's more than that.

The Witness: Four-ten.

Mr. Biggs: Oh. Four-ten. That's the only evidence that I would know of, other than the witness' own recollection, if the Court please.

The Court: Yes.

Mr. Biggs: I will ask—may I, then, again—I think [172] your Honor has ruled. Have you ruled on the question?

(Testimony of Marvin T. Warlick.)

The Court: I am going to overrule the objection and let him testify.

Mr. Biggs: Yes.

Q. Now, give us your best recollection of what you sold the land for.

A. It was either three thousand or thirty-five hundred.

Q. Yes.

A. I know there was an adjustment on the commission with a real estate man. And I don't remember whether we made the adjustment.

The Court: I think that would have to go—all right.

The Clerk: Was it marked as an exhibit, your Honor?

The Court: Are you offering it?

Mr. Biggs: I didn't have it marked, your Honor. But perhaps I had better, in view of Counsel's objection. This is a photostatic copy.

The Court: The stamps show a \$3,500 consideration.

Mr. Biggs: All right, if that's what it adds up to, I will offer it.

The Court: Did you put on the stamps that were required by law and in the correct amount?

The Witness: Yes.

The Court: Between——

Mr. Biggs: Thirty-five hundred and four thousand was [173] what the stamps showed.

The Court: Wasn't it a dollar ten a thousand?

(Testimony of Marvin T. Warlick.)

Mr. Husband: I believe there is \$4.40 worth of Revenue Stamps on there.

The Court: I thought it was \$4.10.

Mr. Biggs: That's what I thought. Might have gotten up to \$4,000, then. Any objection?

Mr. Dezendorf: Has it been offered?

The Court: Yes.

Mr. Biggs: Yes; I have offered it.

Mr. Dezendorf: No objection.

The Court: Fine. Admitted.

(At this point a photostatic copy of a document entitled Warranty Deed, dated October 29, 1942, was marked for Identification and received in evidence as Defendant's Exhibit 78.)

Q. (By Mr. Biggs): Now, you sold this to a Mr. Tucker—the land to Mr. Tucker, is that correct? A. Two brothers.

Q. Two brothers? A. Yes; two brothers.

Q. Yes. Did you tell him about your transaction with Siuslaw Forest Products in selling timber?

Mr. Dezendorf: Just a moment. I would object to that for [174] the reason and upon the ground it is not binding upon us whatever this man may have said to the Tuckers.

Mr. Biggs: I think it definitely——

The Court: Objection overruled. Because I think the testimony they are going to show is that Tucker told that to Seaver, if they can tie that up.

Mr. Biggs: Seaver has already admitted that,

(Testimony of Marvin T. Warlick.)

your Honor. He admitted on the stand yesterday that Tucker told him he acquired no timber in that property.

Mr. Dezendorf: I still hope the Court understood my objection as far as whatever this man told Tucker not being binding on us.

The Court: Oh. That's right; except that I think it's to show knowledge.

Mr. Biggs: All the way around.

The Court: Knowledge in Tucker.

Mr. Biggs: That's right.

The Court: Of his understanding, which was communicated to Seaver.

Mr. Dezendorf: There is a further reason, too, and that is that as far as we know the Tuckers are not going to be witnesses here. It's pure hearsay and it's something against which we have no right of cross-examination.

Mr. Biggs: It doesn't make any difference. Tucker is not a party to this lawsuit. [175]

You can call him if you want to. And I think we both checked with him. But the point is we are showing by this man who sold the land the representations he made to his purchaser. We show by the purchaser from the intermediate purchaser the representations that were made to him, which are consistent with the grantors. So we have, therefore, established the full chain of bounds.

The Court: All right.

Mr. Biggs: Yes. Mr. Warlick?

The Witness: I told Mr. Tucker that all the

(Testimony of Marvin T. Warlick.)

timber on the place had been sold and he was getting only the land and the buildings.

Mr. Biggs: Yes.

Q. Do you know who drafted the contract——

A. No; I don't.

Q. ——between you and Siuslaw, Mr. Warlick?

A. My memory would be that Siuslaw drafted the contract. I told him since he had experience in those things to go ahead and draw up the contract and I'd sign it.

Q. I wanted to ask you one other question: You were around here in Eugene for a good many years prior to the sale. Did you have any particular knowledge during those years of the extent of second growth fir operations, milling or logging in Lane County, speaking about the period immediately prior to '42 or the years prior to '42, Mr. Warlick? [176]

A. I—we had.

Mr. Dezendorf: Just a moment. I would have to object to that until they ask the gentleman as to whether he has knowledge. I don't think they can just start out by attempting to qualify him with a question which may be an ultimate question.

The Court: All right. Qualify him.

Mr. Biggs: Had you overruled that, your Honor?

The Court: I sustained the objection.

Mr. Biggs: Oh. You sustained it.

The Court: Mr. Warlick has testified that he bought and sold some timber; that he was connected with the Eugene Hospital dealing with these lum-

(Testimony of Marvin T. Warlick.)

ber companies and he knew what was happening to second growth when they were logging. But I didn't know whether that would fully qualify him. And I think probably that you ought to ask him a few more questions.

Mr. Biggs: Oh.

Q. Did you, yourself, actually buy and sell any second-growth tracts as such?

A. In what time, sir?

Q. Well, prior to '42.

A. No; not prior to '42.

Q. It was only after 1942 that you personally dealt in that, is that correct?

A. Right. [177]

Q. What, if any, interest did you have in timber, personal interest or experience with timber, prior to 1942 other than the ownership of your own tract of land?

A. Well, I would say none in this part of the country.

Q. Yes. You did get into some negotiation later on buying and selling other tracts of land, did you, Mr. Warlick, after 1942? A. I did.

Q. Yes. How soon after 1942 did you familiarize yourself with the nature or the uses that were being made for second growth?

A. Well, as I started to say, my work with the loggers, sawmills, and such, caused me to go back into the woods and seek these contracts with mills, loggers, and so forth.

Q. Oh, yes.

(Testimony of Marvin T. Warlick.)

The Court: What year are you talking about?

A. Since 1931. And that was my work.

Mr. Biggs: Since then?

Mr. Dezendorf: He is talking about hospital contracts, your Honor.

The Court: I know that.

The Witness: My association with——

Mr. Biggs: Yes.

The Court: Yes.

Q. (By Mr. Biggs): All right. In that connection did you [178] observe the operation, what kind of timber was being logged and manufactured in these mills?

Mr. Dezendorf: I would have to object to that for the reason and upon the ground that it's not been shown yet that he knows what a second-growth tree is or anything else.

Mr. Biggs: All right. We will stop now and ask him.

Q. Do you know what a second-growth tree is, Mr. Warlick? A. Well, I certainly do.

Q. Do you know what an old-growth tree is?

A. Yes, sir.

The Court: Well, what is a second-growth tree?

Mr. Biggs: Yes.

Q. What is a second growth?

A. A second growth normally is what we would call a tree that has come up in a burn shortly after the area has burned over. It's a tree that has very coarse grain in it and is most generally a very

(Testimony of Marvin T. Warlick.)

limby tree. The limbs are down low and the grain is very coarse.

Q. Yes. Is it sometimes referred to by any other name with respect to color?

A. Well, I don't know that the color would—

Q. Well, does red fir mean anything to you?

A. Yes; there is red fir and yellow fir.

Q. Well, would a red fir have anything to do with growth?

A. The red fir is more generally considered the second growth. [179]

Mr. Biggs: Yes.

The Court: Well, how old is the second growth as compared to the old growth?

The Witness: Second growth, I would say, would be anything from one to 90 or 100 years old.

Mr. Biggs: Yes.

Q. All right. Now, the original question was, did you observe during the years that you were calling on these mills any mills that were manufacturing second-growth timber?

Mr. Dezendorf: I would object to that.

The Court: I think you must have some other people who know about that.

Mr. Biggs: We have. You may cross-examine.

The Court: I am not denying that Mr. Warlick may be an expert, but I think you have other men who are experts—admitted experts.

Mr. Biggs: Yes.

(Testimony of Marvin T. Warlick.)

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Q. Do you know what an old-growth tree is?

A. Yes, sir.

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The Court: I am not denying that Mr. Warlick may be an expert, but I think you have other men who are experts—admitted experts.

Mr. Biggs: Yes.

(Testimony of Marvin T. Warlick.)

Cross-Examination

By Mr. Dezendorf:

Q. Mr. Warlick, did you read the contract of May 4, 1942, before you executed it?

A. Yes, sir.

Q. As a matter of fact, after you read and considered it you suggested the insertion that appears in the exhibit, did [180] you not?

The Court: This is the exhibit if you want it. Do you want the original?

Mr. Dezendorf: There is another one here. I wonder if I might have Exhibit 1 handed to the witness, please?

Q. Mr. Warlick, will you look about three-quarters of the way down the page there and find an insertion that's made there in typewriting between the ordinary lines?

The Court: Not to exceed five years. is that the one?

Mr. Dezendorf: Yes.

The Court: All right. Was that put in at your suggestion?

The Witness: Your Honor, I don't think so. I think it was in there when it was presented to me.

Q. (By Mr. Dezendorf): It was interlined in there when it was presented to you, is that correct?

A. That's my memory of it.

Q. And you don't recall any particular reason why that was put in?

(Testimony of Marvin T. Warlick.)

A. I don't know, other than the conversation that led up to the formation of the contract.

Q. But you did read the contract over pretty carefully before you signed it?

A. I would say that I looked it over. My memory is that Mr. Davidson brought it to my home and I just glanced it over [181] and I said, "Well, I think that's got everything in it," and signed it, and my wife signed it, and he handed us the check.

Q. Did you read it?

A. I didn't study it. I might have—I glanced over it.

Q. But you looked at it enough to satisfy yourselves that it conformed to your understanding with Mr. Davidson; is that correct?

A. Oh, yes. Certainly. I wouldn't have signed it if it hadn't have been approximately what we had agreed on.

Q. Now, in your discussions with Mr. Davidson, didn't you indicate to him that once they started logging you didn't want the place to be torn up very long?

A. I did.

Q. Didn't he tell you that once they started they could log it in a few months?

A. If they devoted all of their machinery and the entire cut of the mill to it.

Q. Well, did he——

A. He pointed out.

Mr. Biggs: Let him finish, if you will, please, Mr. Dezendorf.

Mr. Dezendorf: I am not trying to interrupt him.

(Testimony of Marvin T. Warlick.)

The Witness: He pointed out to me that the mill was cutting around 100,000 a day; that if they cut nothing but the logs off [182] of my place I could figure out how long it would take, but that depended altogether on market conditions and the number of hours that the mill was running. They might put on a night shift, or something like that, and cut even more.

But he did point out to me that he didn't start in at one corner of a section and take the entire section. They logged it according to the topography of the land.

Mr. Dezendorf: I would ask that the answer be stricken as not responsive.

Mr. Biggs: I don't know why that isn't responsive.

The Court: I think it is responsive, and I am going to overrule the objection.

Q. (By Mr. Dezendorf): Let me ask you the question again to see if I can get a direct answer to it, Mr. Warlick. Didn't Mr. Davidson assure you that it would take only a few months to remove the timber once they started?

A. Under the conditions that he spoke of, yes.

Mr. Dezendorf: May I ask that we get a direct answer.

The Court: Well, I don't think your question is capable of that kind of an answer. I don't think it's capable of a Yes or No answer, and I am going to rule that he has answered.

Mr. Dezendorf: If the Court please, I am trying

(Testimony of Marvin T. Warlick.)

to lay the foundation for impeachment. I don't know how I can impeach him if he doesn't answer the question.

The Court: Have you a former statement from him? [183]

Mr. Dezendorf: There is a former statement from him in the pleadings in this case which is directly contrary to what he is now testifying.

The Court: All right. Then I am going to rule that you can impeach him now with that document, if you have a document to impeach him.

Mr. Dezendorf: Very well. Let's use the original. Do you have the original pleadings?

The Court: It's an affidavit that he gave Mr. Husband.

Mr. Biggs: Do you have a copy of the affidavit?

The Witness: No. This is the contract.

Mr. Dezendorf: Well, the Court is getting the original out. I have a photocopy.

Mr. Biggs: Then may the witness see my yellow copy, your Honor?

The Court: He can see the original.

Q. (By Mr. Dezendorf): Would you please read that, Mr. Warlick, and see if that refreshes your memory?

A. I still say the same thing, sir.

Q. Well, you have read the affidavit?

A. Yes.

Mr. Dezendorf: Unfortunately, I don't have a copy to work from.

Mr. Biggs: I haven't either.

(Testimony of Marvin T. Warlick.)

The Court: Here is the original. I will admit the [184] affidavit in evidence for impeachment purposes. What are you going to mark it?

Mr. Dezendorf: I wanted to ask him a question, but I don't have a copy to work from.

(At this point a two-page photostatic document entitled Affidavit in Support of Defendant's Motion for Summary Judgment was marked for Identification and received in evidence as Plaintiff's Exhibit No. 33.)

Q. (By Mr. Dezendorf): Mr. Warlick, I guess you don't have it before you now, do you?

The Court: Yes; he has.

Q. (By Mr. Dezendorf): Do you find this on Line 24 on the first page:

"At the time negotiations first started on this timber, I was told that it would not take long to remove the logs once operations were started."

Did you make that statement?

A. I did and also the following.

Q. Was that what Mr. Davidson told you?

A. At the beginning, yes. When negotiations first started it was. And no definite time was ever discussed or agreed [185] upon.

Q. But you were assured by Mr. Davidson that once they started it wouldn't take long to finish it?

A. Mr. Davidson, that was his opinion, yes. But there was no agreement as to time or anything like that.

Q. Now, Mr. Warlick——

(Testimony of Marvin T. Warlick.)

Mr. Biggs: May I see that, please? It would be interesting to know what the document is.

Mr. Dezendorf: That was the one which was served on us as the copy of the motion.

The Court: Yes.

Mr. Biggs: Yes.

Q. (By Mr. Dezendorf): Now, Mr. Warlick, Mr. Davidson looked through the property to arrive at his own conclusion as to how much timber was there during the time that you were negotiating with him, did he not? A. Right.

Q. And he told you what his cruise was, did he not? A. Right.

Q. That was something less than 5,000,000 feet of timber, was it not?

A. I would say approximately 5,000,000. I don't remember the exact—but right around—but that was the old growth.

Mr. Biggs: I am sorry, your Honor. I was reading. May I have the answer? [186]

The Court: 5,000,000, but that was old growth?

Mr. Biggs: Yes.

Q. (By Mr. Dezendorf): As a matter of fact, Mr. Davidson told you that he wasn't interested in anything but old growth, didn't he?

A. The first time when we first talked about it, yes.

Q. And he told you—— A. That——

Q. Excuse me.

A. And that was when we discussed how long it would take to take the timber out.

(Testimony of Marvin T. Warlick.)

Q. And at the time he told you that they were only interested in second growth—first growth—in old growth he said they had no market for—no use for second growth, didn't he?

A. He said they were not cutting it at that time, not buying it.

Q. What use did you intend to make of the money that you procured in selling timber to Siuslaw Forest Products?

A. Well, there were two things—immediate things: Put my children through the University and to finance my campaign.

Q. What use did you make of the money that you got from the sale of the timber, Mr. Warlick?

A. I used it for the purpose I sold the timber for.

Mr. Dezendorf: I'm sorry. I didn't hear [187] that.

(At this point the witness' last answer was read by the Court Reporter.)

Q. (By Mr. Dezendorf): So it's your statement you used the timber to finance a campaign to run for Congress and used it to put your children through school? A. (Witness nods head.)

Q. Mr. Warlick, isn't it a fact that you used the money to buy some immediately adjacent timber? A. It is not.

Q. All right. When did you buy some immediately adjacent timber to the property that you sold?

(Testimony of Marvin T. Warlick.)

A. For the sum of \$250 within the next twelve or eighteen months I bought an adjoining place.

Q. And how big was it?

A. My memory is 430 acres.

Q. And you say you bought it for \$250?

A. Cash down.

Q. And how much was the total purchase price?

A. \$6,000.

Q. Now, when, if ever, did you sell the timber on that second piece of property to Mr. Davidson?

A. I couldn't tell you the exact time, but within one or two years after I bought it.

Q. And was that sold on a contract?

A. Yes; sold on a contract. [188]

Q. Did you sell the merchantable timber on that property to Mr. Davidson?

A. I haven't read the contract since, probably, the month after I sold it. But it's my understanding—my memory is that I sold the merchantable timber—all the timber on the place.

Q. So that so far as you are concerned, it is your present testimony, I take it, that you made the same kind of a timber sale on both the initial piece and on the second piece?

Mr. Biggs: I object to that as being very unfair, if the Court please. Counsel reaches out—

The Court: Let me hear the question again.

(At this point Mr. Dezendorf's last question to the witness was read by the Court Reporter.)

(Testimony of Marvin T. Warlick.)

Mr. Biggs: I object to that, without even showing the contract. He says he hadn't seen it since a month after he signed it.

The Court: Have you got a copy of the contract?

Mr. Dezendorf: I have.

The Court: You haven't?

Mr. Dezendorf: I have.

The Court: Yes.

Mr. Dezendorf: But I think I am entitled to test his memory in accordance, especially, with his previous questions [189] and answers. I don't have to show him everything I have in order to——

Mr. Biggs: Well, then——

Mr. Dezendorf: ——log down a foundation to impeach him.

Mr. Biggs: I am certainly going to make another objection, if the Court please. This man isn't an expert witness. I let you go ahead on a wholly irrelevant line of questioning, asking him what he did about the money. You cannot impeach a witness on impeachment on collateral matters. Counsel should know that. I object to it on that ground.

Mr. Dezendorf: Well, I, perhaps, had better wait for the Court's ruling.

The Court: I am going to sustain the objection on the ground that you can't impeach on a collateral matter.

Mr. Dezendorf: Now, out of the presence of the witness, may I make a statement to your Honor to show you why I think it is material, so that he

(Testimony of Marvin T. Warlick.)

will not be advised of the possible foundation for impeachment that I intend to lead him into?

The Court: We can do that during the recess. Take up another matter. We can take a recess now. It is 11:00 o'clock.

(At this point a recess was taken, after which the following matters were heard in the Court's chambers out of the presence of the witness presently testifying.) [190]

Mr. Dezendorf: If I may preface my remarks, I am surprised at the limit on the cross-examination that is being imposed. I am at this time attempting to test this gentleman's memory as to whether or not he is not confused with two contracts with Mr. Davidson that he entered into. And I think that I am clearly entitled to do that.

And I propose to show, if permitted to proceed, that he is in fact thinking about the second contract in connection with the testimony he is giving instead of the first one.

I propose to show, if permitted to proceed, the second contract was the one under which he sold all of the timber and in which he sold all of the timber which might mature or become merchantable during the term of the contract; whereas, the initial May 4th, 1942, contract with which we are here concerned is completely the opposite and relates only to a sale of merchantable timber.

The Court: Well, if that's the case, then, it's not an impeaching document.

(Testimony of Marvin T. Warlick.)

Mr. Biggs: Not at all.

The Court: Unless it is opened up it's not available for use, because the purpose of sealed documents is to impeach. Now, under the Oregon rules when a man says he doesn't remember the terms you may not impeach him.

Mr. Biggs: That's right. [191]

The Court: And that's the rule in the Federal Court, also.

Mr. Dezendorf: If I may revert to what questions had just been answered at the time your Honor sustained the objection, he said that he sold all of the timber in that second sale and he sold all of the timber in the first sale. Now, he isn't saying that he doesn't remember.

I am trying to follow that up to show that——

The Court: Of course, he didn't say what you said he said.

Mr. Dezendorf: Let's have it. The record is available.

The Court: All right.

Mr. Biggs: And, even so, it isn't a proper way to proceed here. You asked him: "Now, what is your best recollection of that," and then told the Court you intended to impeach him by his recollection.

The Court: Well, I recall very well what he said. He said, "I haven't seen that contract since the month after it was executed. I don't remember its terms." But he says, "I think it provided that

(Testimony of Marvin T. Warlick.)

I"—he said, "All the timber. All the merchantable timber." He used both of those words.

Mr. Biggs: That's right.

The Court: Now, I don't see how you can impeach a man under those circumstances. If you want to refresh his memory, show him the document. [192]

Mr. Biggs: That's right.

Mr. Dezendorf: Well, I still believe I am entitled, on cross-examination, to test this gentleman's memory. And I am a little more hopeful as to what those prior questions and answers of his were than your Honor seems to recall.

The Court: All right. Let's look at his answer. Let's look at the questions and the answers.

(At this point the following testimony was read by the Court Reporter:

("Q. Did you sell the merchantable timber on that property to Mr. Davidson?

("A. I haven't read the contract since, probably, the month after I sold it. But it's my understanding—my memory is that I sold the merchantable timber—all the timber on the place.

("Q. So that so far as you are concerned, it is your present testimony, I take it, that you made the same kind of a timber sale on both the initial piece and on the second piece?")

The Court: Your statement in which you attempted to recapitulate what he said was not true.

(Testimony of Marvin T. Warlick.)

Mr. Dezendorf: I said, "I take it," which is a question, [193] I believe.

The Court: No. I am going to rule that this is not an impeaching question and that under the Rules you may not use the document now. But if you desire to open up the document, then I will permit it to be marked and you can present it to him.

Mr. Husband: There are two or three things in that contract that Mr. Dezendorf hasn't mentioned and I think are of great significance in that when it talks about merchantable timber it says "and now growing." If the Court will read the first three or four lines of that contract, it says, "All merchantable, old-growth fir—old-growth fir, second growth and the hemlock."

The Court: I am not interested in the terms at all. I'm interested—this is an evidentiary matter.

Mr. Husband: So that I think—may I say something further?

The Court: Yes.

Mr. Husband: So that I think if those two contracts can be reconciled, even under Mr. Dezendorf's—

The Court: I am not interested in that. I'm just interested in the question of whether the procedure which he follows is in accordance with our Rules.

Mr. Dezendorf: Yes. Now, may I ask one further question, your Honor? [194]

Mr. Biggs: Let me just make an observation here. I may have misunderstood that as the Re-

(Testimony of Marvin T. Warlick.)

porter read it, but I understood the witness to say that it was his recollection that he did not sell all the timber the second time. What is the basis for even impeachment?

Mr. Dezendorf: He said "all the merchantable timber," right after.

The Court: First "merchantable timber," and then "all the timber."

Mr. Dezendorf: That's correct.

Mr. Biggs: That's right; which is what you are now contending the document shows.

The Court: Well, I ruled in this thing. Either you are going to show him the contract, open it up, or you are not going to pursue that line of interrogation.

Mr. Dezendorf: That's the point that led me to the question I was going to ask. Is your Honor restricting me, then, from developing any further on cross-examination with this witness his memory of the terms of the second document?

The Court: No.

Mr. Biggs: Without reference to the document.

The Court: Without.

Mr. Biggs: A witness is always entitled, if the Court please, to be shown the document if he attempts to impeach him. [195]

The Court: Only if he asks for it.

Mr. Biggs: I think it's only fair, considering it is a document he hasn't seen before.

The Court: If there is a document in existence, I think it should be shown.

(Testimony of Marvin T. Warlick.)

Mr. Biggs: That's correct.

The Court: It is precisely on that basis that I took under advisement your motion to strike, because there is a document in existence.

Mr. Dezendorf: I take it, then, that the answer to my question is that I may not pursue——

The Court: Without showing him the document, yes. You can show him the document and ask him any question you want.

Mr. Dezendorf: Very well. I guess that terminates our matter here.

The Court: We will reconvene this afternoon at the Law School.

(The following proceedings were held in the courtroom:)

The Court: Take the stand.

(At this point the witness resumed the witness stand.)

Q. (By Mr. Dezendorf): Mr. Warlick——

A. Yes, sir.

The Court: I think he is through with that document.

The Witness: I had it in my hand when I left.

Mr. Dezendorf: You are correct, your Honor.

The Court: You were through with it?

Mr. Dezendorf: Yes. You are correct.

The Court: All right.

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No. 16357

In the
United States Court of Appeals
For the Ninth Circuit

JOHN N. SEAVER, JR., *Appellant*,

vs.

UNITED STATES PLYWOOD
CORPORATION, *Appellee*.

APPELLANT'S BRIEF

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, District Judge.

JURISDICTION

This action was brought in the Circuit Court of the State of Oregon for Lane County by plaintiff-appellant, a citizen of Oregon, against defendant-appellee, a New York corporation (R. 3). Appellant seeks to recover damages from appellee arising out of appellee's cutting and removing certain timber from lands owned by appellant (R. 3).

Appellee removed the case to the United States District Court for the District of Oregon under 62 Stat. 937 (28 U.S.C.A., Sec. 1441). The amount in controversy, exclusive of interest and costs, exceeds \$3,000.00 (R. 10).

Appellant has appealed from the final judgment of the District Court (R. 65).

The District Court acquired jurisdiction under 62 Stat. 930 (28 U.S.C.A., Sec. 1332) and 62 Stat. 937 (28 U.S.C.A., Sec. 1441). This court acquired jurisdiction under 62 Stat. 929 (28 U.S.C.A., Sec. 1291) and 62 Stat. 930 (28 U.S.C.A., Sec. 1294).

STATEMENT OF THE CASE

Appellant filed this action against appellee, for timber trespass arising out of appellee's cutting and removing certain timber from lands owned by appellant (R. 3).

Appellee claimed the right to cut this timber by virtue of a contract entered into in 1942 between appellant's predecessor in interest and appellee's predecessor in interest (R. 6-8). The trial court held that the timber cut by appellee was owned by appellee, under the provisions of the timber contract (R. 49-65), and entered judgment for appellee, except appellant was awarded judgment for \$80.00—double the value of some cedar

trees cut by appellee (R. 65). Cedar was admittedly reserved to appellant under the contract (R. 98-99).

The principal question raised on this appeal concerns the construction of the 1942 contract and, particularly, "What timber did appellee's predecessor and appellee acquire under the contract?"

On May 4, 1942, Marvin T. Warlick and his wife, the predecessors in interest of appellant, sold to Siuslaw Forest Products, Inc., the predecessor in interest of appellee, "all of the *merchantable* old growth and second growth fir and hemlock timber either standing or down and now growing or located" (emphasis supplied) on the real property described in the contract (R. 10).

In 1949 appellee's predecessor commenced logging operations on the property, and between 1949 and 1953 it removed the greater part of the old growth fir timber (Exs. 7 & 8, R. 53, 59). Subsequent to this logging activity, agents of appellee's predecessor filed with the Assessor of Lane County, Oregon, affidavits to the effect that *all* timber had been removed from the property. (Ex. 4). Thereafter appellee went back on the property covered by the complete timber removal affidavits and cut and removed substantially all of the second growth timber which had been passed over in the first cutting. (Exs. 7 & 8).

The trial court held (and in doing so refused to follow the decisions of the Oregon Supreme Court to the contrary) that appellee had the right to go back and cut the second growth timber which was not cut when the land was first logged prior to 1953 and disregarded entirely the effect of the timber removal affidavits filed after the first cutting when the old growth was removed.

The trial court clearly erred in holding appellee owned and was entitled to remove on the second cutting the second growth timber because:

1. Appellee had the right to cut, and acquired title to, only such timber on this property as was *merchantable* on the date of the contract which was May 4, 1942.

2. Under all of the evidence in this case, on May 4, 1942, the second growth timber on this property was *not* merchantable.

3. There is no evidence to support a finding that the second growth timber on this property was merchantable on May 4, 1942.

Appellant duly filed objections to proposed findings and conclusions tendered by appellee (R. 39, 48) and appealed from the judgment entered after adverse findings and conclusions were entered (R. 65).

SPECIFICATION OF ERRORS

1. The District Court erred in finding:

“The land upon which the timber in question was situated (hereinafter referred to as the Seaver tract) is in the Coastal Range near the community of Mapleton in Lane County, Oregon. The predominant species and grades of timber in that area were those described in the contract of May 4, 1942. At that time and for years prior thereto, it was the prevailing custom and practice in the area to purchase timber by the stand rather than by individual trees.”

for the reason that there is no evidence to support it and this finding is irrelevant to any issue in the case.

2. The District Court erred in finding:

“In 1942 and subsequent years, including the period during which defendant and Siuslaw cut and removed timber from the Seaver tract, customary logging practices in the fir and hemlock regions in western Oregon, including the Mapleton area, consisted of so-called high lead or donkey logging whereby specific stands being logged were logged clean, except for seed trees, in that individual trees within a particular stand which were not actually felled and bucked, were nevertheless knocked down or destroyed as a necessary incident of the logging operations. Good logging and forestry practices required that timber which was not removed from the logged area for use be burned as slash.”

for the reason there is no evidence that the old growth and second growth timber were growing in the same stands so that they had to be logged together. As a matter of fact, substantially all of the old growth was removed by itself and then the second growth timber was removed in a second cutting after complete timber removal affidavits had been filed and after its value had appreciated about 400% in the period following the first cutting of the old growth.

3. The District Court erred in finding:

“In the Mapleton area, as well as other fir-growing areas, in 1942, old growth fir produced peeler logs which were then in increasing demand in the plywood industry as well as saw logs for which there was then and for many years prior thereto had been an active and ready market. Although old growth fir was in greater demand than second growth fir, nevertheless a substantial and growing demand then existed in this area for second growth fir stands, second growth fir logs and second growth fir products, such as poles, piling and numerous manufactured products, including car decking, ties, bridge decking, studs, planks, siding and other lumber products for building and construction purposes.

“Hemlock logs, in 1942 and in years prior and subsequent thereto, were being regularly sold primarily for pulp to paper manufacturers in the State of Oregon. In 1941 and 1942 Siuslaw was engaged in logging hemlock timber on other tracts in the general vicinity of the Seaver tract and selling it for pulp to Crown Zellerbach, a paper manufacturing company.”

for the reason that said finding is not relevant to any issue in this case. The question to be answered is whether the second growth timber *on appellant's property* was merchantable on the date of the contract in 1942. Under all the evidence it was not and there was no evidence that it was.

4. The District Court erred in finding:

“At the time the parties were negotiating the timber purchase contract, Siuslaw was planning a multipurpose logging program for the utilization of its timber in the Mapleton area, not merely for saw logs but also for poles, piling, bridge decking, ties, pulp and other lumber products. It had embarked upon the construction of a logging road toward and into part of its lands adjacent to the Seaver tract. It was completing construction of a lumber mill at Mapleton for the purpose of sawing and processing logs from its timber in that area and it was interested in acquiring lands contiguous to its other holdings.

“In May of 1942 and immediately prior thereto during the negotiations between Siuslaw and Warlick for the purchase of the timber on the Seaver tract, the parties did not know when the tract would become operable because of many factors then undetermined. For instance, they did not know when the logging road would be extended to the Seaver tract or precisely in what manner or at what time the tract would be logged. These factors would be governed by future development of Siuslaw's over-all logging program. In view of these uncertainties and of Warlick's willingness that the commencement of the logging be delayed, they agreed on a relatively long period of time, that is, a total period of twenty-

five years, within which Siuslaw might cut and remove the timber from the tract.”

for the reason that it is not relevant to any issue in this case.

5. The District Court erred in finding:

“The Tuckers, who purchased the fee from Warlick, and plaintiff, who purchased the fee from the Tuckers, at all times knew of the original intention of the parties with respect to the grades, species and quantity of timber conveyed, and neither the Tuckers nor the plaintiff believed that their respective deeds to the fee vested in them any rights in any of the fir and hemlock which defendant or Siuslaw desired to remove from the tract.”

for the reason that said finding is based upon evidence which was admitted in violation of the parol evidence rule. In any event, the intention of the original parties is not binding upon this appellant. Since the contract states that only *merchantable* timber is conveyed, the parol evidence rule precludes proof of the alleged “actual” intent of the original parties.

6. The District Court erred in finding:

“The first logging on the Seaver tract was done in 1949. Logging continued each year thereafter until the end of the year 1955. More than half of the total amount of the timber described in Find-

ing No. IX was removed during the years 1949 and 1950. Only a small area was logged in 1951. In 1952 timber was felled, bucked and cold decked but was not removed therefrom until the following year. Major logging on this tract was carried on during the years 1953 and 1955. In 1954 a general strike in the logging industry caused a shutdown of the defendant's logging activities in the area with the result that a relatively small quantity of timber on the Seaver tract was logged during the year."

for the reason that the only evidence is that prior to 1953 substantially all of the old growth timber had been removed by appellee or its predecessor. It had filed affidavits with the County Assessor of Lane County that all the timber had been removed (Ex. 4). Then, in 1953, after the price of second growth timber had appreciated from a 1940 value of \$1.20 per thousand to a value of \$19.00 per thousand (R. 54), appellee and its predecessor entered the property again and began removing the second growth which had been left behind when the first logging was completed.

7. The District Court erred in finding:

"The Seaver tract was logged as a part of Siuslaw's and defendant's entire holdings in the Mapleton area at all times in a manner consistent with defendant's and Siuslaw's mill inventory requirements and other practical considerations, including the development of a main logging road and spur logging roads. Interruptions in the logging of the

Seaver tract were not intended to and did not operate as a relinquishment or abandonment by defendant or Siuslaw of any of the timber thereon."

for the reason that said finding is not relevant to any issue in this case and for the further reason that the conclusive evidence is that appellee's predecessor did intend to relinquish and abandon the property after it cut the old growth timber thereon.

8. The District Court erred in finding:

"According to the prevailing standards of merchantability in the area, all of the fir and hemlock timber removed by defendant and Siuslaw as above stated was in fact merchantable on May 4, 1942."

for the reason that there was no evidence that the second growth fir timber on appellant's property was merchantable on May 4, 1942. The only evidence in the case is that that second growth timber was not merchantable in 1942.

9. The District Court erred in finding:

"During the entire period that defendant and Siuslaw conducted logging operations upon the Seaver tract, plaintiff lived in close proximity to the tract and was personally familiar with the nature and extent of logging operations being conducted thereon. From the time in 1952 when plaintiff first

acquired his interest in this tract until the filing of this action in 1956 plaintiff did not have any objection to the severance and removal by defendant and Siuslaw of the fir and hemlock timber for which plaintiff seeks damages in this action.”

for the reason that there is no evidence that the plaintiff was advised as to his rights under the contract until 1956.

10. The District Court erred in finding:

“The conduct of plaintiff and the Tuckers in requesting and obtaining reimbursement of property taxes allocable to the timber and fire patrol assessments, and in failing to protest or object to the cutting and removal of the timber during the course of the logging operations, evidences their knowledge of the intention of the original parties to the contract. Additionally, plaintiff, by entering into the logging contract referred to in paragraph X hereof and thereby agreeing that defendant was the owner of all the fir and hemlock timber on certain areas of the tract and by cutting and removing for defendant some 108,000 board feet of timber from the tract pursuant to said logging contract, evidenced not merely his consent to the removal of that timber but also his understanding that all of the other fir and hemlock timber removed by defendant had been sold to Siuslaw pursuant to the terms of the contract of May 4, 1942, as understood and construed by the parties thereto.”

for the reason that the alleged intention of the parties is immaterial when the agreement is reduced to writing

and contains well-understood terms. Further, there is no evidence that appellant knew what his rights were at the time the timber was being removed.

11. The District Court erred in finding:

“Neither defendant nor Siuslaw ever relinquished or abandoned any of its rights in or to any of the fir and hemlock timber which it acquired by the contract of May 4, 1942.

“The logging affidavits filed in 1950 and 1951 by Frank McPherson (logging superintendent for Siuslaw) with the Lane County Assessor stating that all of the merchantable fir and hemlock timber had been removed from a large segment of the Seaver tract, were intended by McPherson to reflect the status of the initial timber inventory in Siuslaw’s timber depletion records. This initial inventory had been recorded without the benefit of a cruise or other accurate information as to volume and represented only an estimate of the amount of Siuslaw’s timber holdings on the Seaver tract and surrounding and adjacent tracts.

“When McPherson filed the logging affidavits, he had not personally inspected the entire Seaver tract, and was unaware of large tracts of remaining timber thereon in ravines and on ridge slopes into which spur logging roads had not yet been constructed. The terrain of these ravines and ridge slopes on which the remaining timber stood was comparable to the terrain of other portions of the Seaver tract theretofore logged by Siuslaw. McPherson made and filed the affidavits in good faith without intending to mislead or deceive the County Assessor, and the record does not establish that the Assessor was in fact misled or deceived. On the other

hand, defendant did pay taxes on the remaining timber after the McPherson affidavits were filed. McPherson was not an officer of Siuslaw or of defendant and was not authorized in preparing and filing the affidavits to relinquish, abandon or in any way prejudice his employer's title to any of the timber, and he did not intend to do so either by the filing of the logging affidavits or by his conduct in any other particular."

for the reason that there was no substantial evidence to support such a finding. As a matter of fact, the initial inventory of appellee was based on the Hooker cruise and accurately represented the amount of merchantable (old growth) timber on the property. Further, the agents of appellee's predecessor who filed the timber removal affidavits had personally inspected appellant's land and were acquainted with the amount of timber remaining thereon. Furthermore, they in fact had the authority to file the affidavits.

12. The District Court erred in finding:

"The 8,000 board feet of cedar referred to in paragraph IX hereof consisted of only five trees. It was not included in the contract of May 4, 1942, and defendant so admitted on the trial. The value of the cedar was stipulated by the parties to be \$5 per thousand board feet at the time of its severance, or a total of \$40. The circumstances surrounding the cutting and removal of the cedar do not evidence such intentional or willful wrongdoing on the part of defendant as to justify treble damages."

for the reason that the only evidence is that the cedar was willfully cut. Under the law of Oregon, treble damages must follow as a matter of law.

13. The District Court erred in finding:

“Siuslaw and defendant, in all of their respective logging operations upon the Seaver tract, cut and removed the fir and hemlock timber therefrom in a bona fide belief that they were the owners of such timber and were entitled to cut and remove the same from said tract under the terms of the contract of May 4, 1942.”

for the reason that under the law of Oregon there is no question but that appellee and its predecessor did not acquire the second growth timber which was removed on the second cutting after the complete timber removal affidavits were filed and the second growth timber was willfully and intentionally cut. Appellee's belief, bona fide or otherwise, has no effect upon the imposition of treble damages under the Oregon statutes.

14. The District Court erred in its Conclusion of Law

“I

“The cutting and removal of the cedar timber was casual and involuntary, and plaintiff is entitled to judgment against defendant in the sum of \$80, being double the value thereof.”

because there is no evidence that the cutting of the cedar was "casual and involuntary." It was willful and intentional. Therefore, treble damages follow as a matter of law.

15. The District Court erred in Conclusion of Law

"II

"The term 'merchantable' as used in relation to the timber described in the contract of May 4, 1942, in and of itself involves some ambiguity concerning the intention of the parties to the contract, requiring a consideration of the circumstances surrounding the parties at the time the contract was made and the attitude of the parties toward the subject matter subsequent to the execution of the contract. As intended, used and construed by the original parties to the contract and their successors in interest, the terms 'all of the merchantable old growth and second growth fir and hemlock timber either standing or down and now growing or located,' included all of the fir and hemlock timber cut and removed by defendant and Siuslaw."

for the reason that the term "merchantable timber" is not an ambiguous term and it has a well-understood meaning. Under all of the evidence in this case, the second growth timber on appellant's property was not merchantable on May 4, 1942.

16. The District Court erred in its Conclusion of Law

“III

“Defendant owned and was privileged to cut and remove all of the old growth and second growth fir and hemlock timber for which claim is made by plaintiff against defendant.”

for the reason that neither appellee or its predecessor was entitled, under the contract, to remove the second growth timber which was passed over in the first cutting.

17. The District Court erred in its Conclusion of Law

“IV

“Plaintiff consented to the removal by defendant and Siuslaw of all of the fir and hemlock timber for which he claims damages in this action.”

because there was no evidence to support a conclusion that appellant knowingly consented to anything.

18. The District Court erred in its Conclusion of Law

“V

“Neither the defendant nor Siuslaw intended to or did relinquish or abandon any of its rights to the timber involved.”

for the reason that the evidence is conclusive that appellee's predecessor did intend to relinquish and abandon the second growth timber. It filed the removal affidavits and its entire course of conduct is inconsistent with a conclusion that after it initially logged the old growth and filed the timber removal affidavits, it intended to retain any rights in the second growth timber.

19. The District Court erred in entering judgment for appellant in only the amount of \$80, as follows:

"The court having heretofore made and entered its Findings of Fact and Conclusions of Law herein and the case now coming on for judgment in accordance therewith, now based thereon,

"IT IS CONSIDERED, ORDERED and ADJUDGED that plaintiff have and he is hereby granted judgment against defendant for the sum of \$80. No costs."

for the reason that appellant was entitled to triple the value of all timber removed from the property in and after 1953.

20. The District Court erred in admitting testimony concerning the alleged intent of the parties at the time that the contract was negotiated (R. 210-211):

"Q. [By Mr. Biggs]: Yes. And what were your negotiations with Mr. Davidson and—that finally led to the contract? What was your agreement and how did it—was it worked out?

“Mr. Dezendorf: If the Court please, at this point we would have to object to any testimony which would attempt to vary the terms of the contract or to explain what might have been the intention of either this gentleman or anyone else for the reason and upon the ground that what is merchantable timber is a matter of some definiteness. The word was used in the contract. The intentions of the parties with respect to what they may have thought with respect to it are immaterial and may not be introduced because there is no ambiguity in the contract in that regard.

“The Court: I am going to overrule the objection on the authority of the Oregon cases which say that the word ‘merchantable’ is not an unambiguous term but must be construed in the light of the other provisions of the contract and the understanding of the parties.

“However, I do want to say this; That last night I considered the whole question of reformation of the contract and I came to the conclusion that this might not be possible in a case of this kind even if both Mr. Warlick and the Siuslaw Forest Products Company had an understanding that the Siuslaw Forest Products Company cut every tree on the tract, because intervening rights have come in. But I believe that in spite of that fact that this testimony is admissible to explain what is merchantable. * * *”

(R. 213):

“The Court: All right. Restate your question now.

“Mr. Biggs: I have forgotten just what one I stopped on. I will, though.

"The Court: You were asking him about the negotiations which led up to the consummation of the contract.

"Mr. Biggs: Oh, yes.

"Q. You stated, I believe, that you had met Mr. Davidson out there in connection with another business matter. Did you proposed [sic] to him the sale of your timber, Mr. Warlick?

"A. Yes.

"Q. Now, what was his situation, then, as you learned it from him? What was his attitude toward acquiring the timber?

"Mr. Dezendorf: Same objection.

"The Court: So you won't have to do this all the time I am going to give you a running exception to this whole line of interrogation. * * *"

(R. 220):

"Q. Now, what was your intention with respect to the extensiveness of the timber sold; that is, the quantity of the timber sold by this contract, Mr. Warlick?

"Mr. Dezendorf: I assume my objection runs—

"The Court: Yes. Your objection goes to all of this witness' testimony.

"Mr. Dezendorf: Yes.

"The Witness: My understanding was that he was buying all of the timber on the place.

"Q. (By Mr. Biggs): You did not intend to reserve any timber to yourself, is that correct?

“A. There was no timber reserved. And after we had decided how we would do it, I said, ‘What about firewood? We want firewood for the couple that I kept up there in the log house and for our own log house.’ And Mr. Davidson said, ‘If you need firewood, you are perfectly welcome to go out and get all you want. If you need a pole to fix the fence or make a chicken house or anything like that, just go ahead and help yourself.’ ”

SUMMARY OF ARGUMENT

I

Under the law of Oregon, only timber which was “merchantable” on the date of the contract passed to the buyer. Timber which becomes merchantable during the life of a timber contract does not belong to the buyer and it belongs to the seller.

II

Under Oregon law only timber which has a commercial value and which can be utilized at a profit is, in fact, “merchantable.”

III

All of the evidence in this case shows that the second growth timber on appellant’s property was not merchantable on May 4, 1942. Appellee was a trespasser when it cut the second growth and is liable for treble damages.

IV

When appellee's predecessor passed over the second growth on the first cutting and swore to and filed with the County Assessor the timber removal affidavits, it thereby abandoned all timber then remaining on the property.

V

Under the law of Oregon, the cutting of the second growth timber was willful and without right and, consequently, appellant is entitled to recover treble damages for the cutting and removal of it.

VI

There is no evidence in this case that appellant consented to appellee's removal of the second growth timber from his property.

VII

As a matter of law, evidence of the alleged "actual" intent of appellant's and appellee's predecessors when they negotiated the 1942 contract was inadmissible.

ARGUMENT

I

Under the law of Oregon only timber which was "merchantable" on the date of the contract passed to the buyer. Timber which becomes merchantable during the life of a

timber contract does not belong to the buyer and it belongs to the seller.

In *Hughes v. Heppner Lumber Company*, 205 Or 11, 283 P2d 142, 286 P2d 126, plaintiff's predecessor deeded to defendant's predecessor "all pine and merchantable fir timber" located on certain land in eastern Oregon. One of the issues in the case was whether the defendant had the right to cut timber which had become merchantable since the date of the contract but was not merchantable at the time the contract was entered into. The Supreme Court of Oregon held that only timber which was merchantable on the date of the contract belonged to the buyer. The court said, at page 15:

"A grant of merchantable timber is a grant only of the merchantable timber on the land at the date of the contract. *Rayburn et ux. v. Crawford et ux.*, 187 Or 386, 398, 211 P2d 483."

Defendant in that case filed a petition for rehearing which was denied with a further opinion in which the court discussed at some length the subject of what merchantable timber passes under a contract or deed. The court said, at page 59:

"It is next argued that on the authority of *Monger v. Dimmick*, supra, defendant was not limited

to the timber that was merchantable in 1939. In that case we quoted from *Adams v. Hazen*, 123 Va 304, 96 SE 741. It has never been the law in Oregon that merchantable timber is that timber which has commercial value 'during the life of the contract.' This clause was inadvertently included in the Monger quotation."

This question was again discussed at some length in the case of *Doherty et ux. v. Harris Pine Mills, Inc.*, 211 Or 378, 315 P2d 566 (1957), where the court said, at page 419:

"The defendant in his brief asserts that 'all merchantable timber,' as those words are used in the contract under consideration, is 'all timber—whatever its size—that had, at the date of the contract, or may have during the life of the contract, a commercial value * * *.' In support defendant cites (authorities). Defendant recognizes that its rights are limited by the 10-inch provision. We quote from defendant's brief:

"* * * The judgment permits the defendant to log merchantable pine and fir timber which will produce logs with a ten inch top from the premises until 1977, without regard to whether such timber was merchantable in 1940.'

We think neither findings nor judgment go that far, but the quoted statement clearly defines the issue.

"Plaintiffs, in addition to their claim that the contract covers only 6,701,000 feet of pine and 25,000 feet of fir, contend that the only timber covered by the contract is that which was merchantable and of the required size in 1943. Plaintiffs rely upon

Hughes v. Heppner Lumber Co., *supra*, 205 Or 11, 283 P2d 142; *Rayburn v. Crawford*, 187 Or 386, 211 P2d 483; *Parsons v. Boggie*, 139 Or 469, 11 P2d 280, and other cases later cited. At this point we find conflict, not in the contract nor the judgment of the trial court, but in the decisions of this court. Both parties cite *Tenny v. Mulvaney*, *supra*, 9 Or 405 (1881). That case does discuss the meaning of 'merchantable' but does not discuss the question of the time as of which it is to be determined.

"In *Parsons v. Boggie*, *supra* (1932), the vendor agreed to sell 'all the good merchantable timber on his land' with a right to remove it 'at any time.' In accordance with the usual rule it was held that the purchaser had only a reasonable time for removal, but the court also said of the contract:

" 'Assuming that the foregoing instrument is a grant of the "good merchantable timber" on the premises described, it is a grant only of the merchantable timber on the land at the date of contract. *Robertson v. H. Weston Lumber Co.*, 124 Miss. 606 (87 So. 120). It does not attempt to convey any timber maturing after that date.
* * *

"We next consider *Monger et ux v. Dimmick et al*, *supra*, decided in October, 1949. The contract provided that vendors 'agree to sell' all of the merchantable timber on said above described lands. Vendors sought a decree declaring the contract rescinded because of breach thereof by defendants. Among other alleged breaches was the cutting of piling by the vendees. The court found numerous breaches of contract by vendees, including the cutting of piling. We have examined the briefs on appeal and the opinion of this court and find no issue raised or discussed as to the time as of which merchantability is to be determined. Nevertheless the court in an opinion by Justice HAY said:

“ * * * For the purposes of this case, we adopt the following definition of the term:

“ “ * * * ‘all merchantable timber,’ as those words are used in the contract under consideration, is all timber—whatever its size— that had, at the date of the contract, or may have during the life of the contract, a commercial value in that locality, for the purpose of manufacture into lumber, or for any other purpose. * * * ”

“Citing *Adams v. Hazen*, 123 Va 304, 323, 96 SE 741, 746, also cited *supra*. All of the quotation from *Adams v. Hazen* was appropriate to the case except the words ‘or may have during the life of the contract,’ which were wholly irrelevant. The words ‘whatever its size’ were appropriate to that case because the contract contained no requirement as to size but only as to merchantability. Those words have no applicability in the pending case because both size and merchantability are specified.

“We next turn to *Rayburn et ux v. Crawford et ux*, decided one month after *Monger et ux v. Dimmick et al.* This opinion was also written by Justice HAY. In March 1946 the vendors contracted to sell and the vendees to buy certain lands. The parties had agreed that vendors reserved the timber but by a scrivener’s error the reservation was omitted from the contract. This court held that the contract should be reformed to accomplish the intended result. No time was specified within which the vendors might remove the timber, so the court, following *Parsons v. Boggie*, held that the reservation was for a reasonable time. It then said:

“ ‘We are of the opinion that the reservation of the merchantable timber in this case was a reservation only of that timber upon the land which was merchantable at the date of the exe-

cution of the contract. * * * 187 Or 386, 399, 211 P2d 483.

“Thus within a period of one month the court construed one contract as including timber which had ‘or may have during the life of the contract’ merchantability, and construed another contract as including only timber which was merchantable at the date of the execution of the contract. The fact that the time for removal of timber in *Monger v. Dimmick* was eight years and that the term in *Rayburn v. Crawford* was for a reasonable time constitutes in our opinion a ‘distinction without a difference.’

“The next case for consideration is *Dahl et al v. Crain et ux, supra*, 193 Or 207, 237 P2d 939 (1951). Plaintiffs as purchasers sought specific performance of a contract for the purchase from defendants of merchantable pine timber. The contract was executed in August 1946 and the term thereof ended in December 1955. Here again there was a controversy as to what was merchantable timber, but not as to the time as of which merchantability is to be determined, yet the court said:

“ * * * However, for the purposes of this case, we adopt the same definition adopted by Mr. Justice HAY in *Monger et ux v. Dimmick et al.*, 187 Or 253, 257, 210 P2d 929; to-wit:

“ “ * * * ‘all merchantable timber,’ as those words are used in the contract under consideration, is all timber—whatever its size—that had, at the date of the contract, *or may have during the life of the contract*, a commercial value in that locality, for the purpose of manufacture into lumber, *or for any other purpose.*” (Italics ours.)’ 193 Or at 225.

“Finally, we come to *Hughes v. Heppner Lumber Co.*, supra, 205 Or 11, 283 P2d 142, 286 P2d 126. In February 1939 plaintiffs deeded to the predecessor of defendant all pine and merchantable fir timber on 116 acres of land here involved. Two days later the grantee of the timber conveyed to the plaintiffs 692 acres of the land in litigation, reserving all of the pine and merchantable fir timber thereon ‘with the right to log the same at its convenience.’ The defendant succeeded to the rights in the reserved timber. This court stated the issue thus: ‘did defendant remove all the merchantable timber as contemplated by the parties in 1939, during the years 1939 to 1948, inclusive?’ The court continued:

“ ‘The parties agree on the issues, at least in respect to this question. Defendant claims and plaintiffs disclaim that the timber now contended for was merchantable timber in 1939. Defendant asserts therefore that they have a reasonable time to remove it. If the timber, however, was not merchantable at that time it follows that the “reasonable time for removal” doctrine would have no applicability.

“ ‘A grant of merchantable timber is a grant only of the merchantable timber on the land at the date of the contract. *Rayburn et ux v. Crawford et ux.*, 187 Or 386, 398, 211 P2d 483.’ 205 Or at 14.

“The defendant after 1948 ceased to log and made no claim to any remaining timber until 1951 when the price had ‘soared some 400 per cent.’ The majority of the court held that in 1951 a reasonable time for removal of the reserved timber had expired. Two judges dissented on this issue but they agreed with the majority on the time as of which merchantability and size are to be determined. From the dissent of Justice WARNER, concurred in by Justice TOOZE, we quote:

“* * * The general rule is that when standing timber of designated dimensions or to be used for designated purposes is sold, only such timber is conveyed as measures up to such dimensions or is suitable for the purposes specified *as of the date of the deed or contract of sale*. 34 Am Jur 504, Logs and Timber, § 22; 54 CJS 696, Logs and Logging, § 17b. * * *’ 205 Or at 39.

“In the opinion denying petition for rehearing the majority said:

“‘It is next argued that on the authority of *Monger v. Dimmick*, supra, defendant was not limited to the timber that was merchantable in 1939. In that case we quoted from *Adams v. Hazen*, 123 Va 304, 96 SE 741. It has never been the law in Oregon that merchantable timber is that timber which has commercial value “during the life of the contract.” This clause was inadvertently included in the *Monger* quotation. *Tenny v. Mulvaney*, 9 Or 405; *Parsons v. Boggie*, 139 Or 469, 11 P2d 280; *Rayburn et ux. v. Crawford et ux.*, 187 Or 386, 211 P2d 483.’ 205 Or at 59.

Thus the dictum in *Monger v. Dimmick* was expressly overruled and the dictum in *Dahl v. Crain*, supra, was overruled by necessary implication. The law as laid down in *Hughes v. Heppner Lumber Co.*, *Rayburn v. Crawford*, and *Parson v. Boggie*, is supported by the great weight of authority. (citations)

“In view of the history of *Monger v. Dimmick* and *Rayburn v. Crawford*, we are convinced that this court in the *Monger* case inadvertently quoted the portion of the opinion in *Adams v. Hazen* which reads ‘or may have during the life of the contract.’ The true rule was stated one month later in *Rayburn’s* case. In any event we adhere to the rule as

stated by both majority and minority of this court in *Hughes v. Heppner Lumber Co.*”

In view of this rule of law of the State of Oregon, the question in this case is: What timber on appellant's property was merchantable on May 4, 1942? Appellee and its predecessor only acquired title to the merchantable timber as of that date and none other.

II

Under Oregon law, only timber which has a commercial value and which can be utilized at a profit is, in fact, “merchantable.”

One of the questions presented in *Hughes v. Heppner Lumber Co.*, 205 Or 11, 283 P2d 142, 286 P2d 126, *supra*, was what was meant by “merchantable timber.” The Supreme Court of Oregon, in its opinion on rehearing at page 57 said:

“We are charged with error in ‘holding that the words “all pine and merchantable fir” in 1939 meant only that pine and fir which could be logged on a profitable basis.’ We did not so hold. Because we relied somewhat on the testimony of witness Hoffman who testified on cross-examination that the timber not removed was not merchantable for the reason that it was unprofitable for defendant to remove it, defendant asserts that we adopted his definition of merchantable timber. *He did testify however, as pointed out in our opinion, that all*

*timber that had a commercial value in 1939 had been removed. In Monger v. Dimmick, 187 Or 253, 210 P2d 929, cited by defendant in his brief on petition for rehearing, we said that merchantable timber is 'all timber * * * that had * * * a commercial value in that locality * * *.'*" (emphasis supplied)

and at page 59:

"It is next argued that on the authority of *Monger v. Dimmick*, supra, defendant was not limited to the timber that was merchantable in 1939. In that case we quoted from *Adams v. Hazen*, 123 Va 304, 96 SE 741. It has never been the law in Oregon that merchantable timber is that timber which has commercial value 'during the life of the contract.' "

See also *Doherty et ux v. Harris Pine Mills, Inc.*, 211 Or 378, 315 P2d 566 (1957) at pages 424-425, where the foregoing language from *Hughes v. Heppner Lumber Co.* was expressly quoted with approval.

Therefore, in the instant case, the definition "merchantable timber" appearing in the contract of sale, must be defined as "timber which had a commercial value" on May 4, 1942.

We will demonstrate that the only evidence in this case is that the second growth timber *on appellant's property* was not merchantable on that date.

III

All the evidence in this case shows that the second growth timber on appellant's property was not merchantable on May 4, 1942. Appellee was a trespasser when it cut the second growth and is liable for treble damages.

Prior to the execution of the May 4, 1942, contract, under which only "merchantable" timber was conveyed (Ex. 1), appellee's predecessor had a cruise of the property made by a man named Hooker (R. 274). Hooker reported there were "about five million feet" of timber (R. 275). (The notes and records of the cruiser could not be produced, since they had been lost (R. 261).) Thereafter, and following some negotiations, the contract was signed. Mr. Davidson, appellee's witness, who negotiated on its predecessor's behalf, *testified that he was not negotiating for the second growth timber.*

"Q. [by Mr. Biggs]: Yes. Was there any discussion about the second growth at that time, Mr. Davidson?

"A. If there was, I don't remember." (R. 275)

The seller, Warlick, agreed with this. He testified:

"Q. [by Mr. Dezendorf]: As a matter of fact, Mr. Davidson told you that he wasn't interested in anything but old growth, didn't he?

"A. The first time when we first talked about it, yes." (R. 237)

It is abundantly clear from the record in this case that both Davidson and Warlick knew the difference between buying "merchantable timber" and buying all of the timber on a piece of property. As a matter of fact, on August 10, 1945, Warlick sold Davidson a parcel of timber near the property involved in this case. (Ex. 30 B). In that contract, Davidson was given a period of twenty years within which to remove the timber and the conveyance sold "all of the standing and downed timber, poles and piling now on the hereinafter described land, *and any timber, poles and piling which shall grow or mature during the term of this contract * * **" (emphasis supplied)

This conclusively demonstrates that the parties did not intend to convey anything but "merchantable timber" when the contract in this case (Ex. 1) was executed. When they wanted to convey more, they knew how to do it, and did it.

Old growth timber is mature timber, sometimes called "yellow fir" (R. 164), which has always been valuable. Second growth timber is fir timber between 40 and 110 years of age (R. 163), which is of limited utility and was not used extensively in 1942 (R. 166-167). As a matter of fact, as late as 1940 *accessible* second growth timber, near a public road (R. 335), sold for \$1.20 to \$1.25 per thousand (R. 332). In 1953, when

appellee started cutting the second growth (3,125,000 board feet were cut by appellee in and after 1953 [R. 53, 59]), the second growth timber on appellant's property was worth \$19.00 per thousand, in 1954 \$24.00 per thousand, and in 1955 \$25.00-\$30.00 per thousand (R. 54). This certainly explains why appellee cut the timber, but constitutes no excuse to it. Concerning the great change in timber values during these same years, the Supreme Court of Oregon said, in *Doherty v. Harris Pine Mills, Inc.*, 211 Or 378, 315 P2d 566 (1957), (page 401):

“* * * We take judicial notice of the fact that market conditions had greatly changed between 1943 and the bringing of this action in 1955.”

On May 4, 1942, appellant's land was virtually inaccessible. This was admitted by counsel for appellee in his opening statement where he said (R. 81):

“They negotiated for some little time. Mr. Davidson wasn't ready to go in there yet to do the logging, didn't know when he would be able to get in there, because it was then not served by any logging roads or ways adequate for the purpose of taking out timber.”

See also proposed finding XV (R. 31), prepared and tendered by appellee's counsel, which says, in part:

“The Seaver tract in 1942 was inaccessible for immediate logging in that it was located in a rugged and rough area into which no logging roads had been constructed. * * *”

See also finding XV adopted by the court (R. 56), which contains this identical language.

Although it was 4 or 5 air miles from the community of Mapleton, because of the rugged terrain, a roundabout route of about 20 miles over almost impassable roads had to be traversed to reach the property (R. 105). Mr. Warlick used “an old model Buick with big high wheels” to reach the place (R. 105).

The expert witnesses, based on all the facts, testified, *without contradiction*, that this second growth timber was, in fact, not merchantable on the date of the contract.

Witness Herbert R. Jones, a forest engineer, testified (R. 145):

“Q. [By Mr. Dezendorf]: Mr. Jones, in answering my following questions will you please accept this definition of merchantable timber: Merchantable timber is that timber which has commercial value, taking into account its size, quality, location, accessibility, demand and market conditions?”

* * * * *

“Q. [By Mr. Dezendorf]: Mr. Jones, having that definition of merchantable timber in mind, do

you have an opinion as to what old-growth and second-growth fir and hemlock timber, if any, standing on the Seaver tract involved on May 4, 1942, was merchantable? And the answer should be either Yes or No.

“A. Yes.

“Q. What is your opinion in that regard?

“A. Well, my opinion is that in 1942 that the only merchantable timber would be the old-growth timber.”

Jones made a cruise of the property after all of the timber had been removed and based upon the records of appellee and information furnished by appellant, he had determined when what timber had been cut. He testified (R. 155):

“Q. (By Mr. Dezendorf): Now, Mr. Jones, bearing in mind, again, the definition of merchantable timber which I gave you immediately prior to the last question regarding merchantable timber, do you have an opinion as to how much merchantable old-growth and second-growth fir and hemlock timber was standing on the property on June 24, 1950, which was merchantable as of May 4, 1942?

“A. I can't give you the exact figure, but as to the old-growth in Section 31 I think it was around seven or eight hundred thousand. But I can't remember exactly.

“Q. Was there any other merchantable timber on the property on June 24, 1950, which was merchantable as of May 4, 1942, other than that that you have just mentioned?

"A. No; nothing that was—based on 1942 merchantability it was not merchantable.

"Q. I take it, then, that using the same merchantability test that it would be your judgment that everything that was removed from the property after June 24, 1950, except the old-growth was not merchantable on May 4, 1942; is that correct?

"A. That's correct."

Witness Fred Buss had had extensive experience in logging (R. 448-449). Mr. Buss testified:

"Q. [By Mr. Hoffman]: Now, Mr. Buss, I want to ask you this and listen, please. Will you please accept this definition I am going to read to you as the definition of merchantable timber in this case? Then you can give us your opinion. Merchantable timber is that timber on a particular date which I will mention which has a commercial value, taking into account its size, quality, its location, accessibility, demand and market conditions. Now, using that as your definition of merchantable timber, do you have an opinion as to whether or not this second-growth timber on the Seaver property on May, 1942, was merchantable?

* * * * *

"Q. (By Mr. Hoffman): Do you have an opinion?

"A. I have.

"Q. What is your opinion?

"A. Wasn't merchantable.

"Q. Was not merchantable?

"A. Not under them conditions."

Mr. Buss also testified (R. 446):

“Q. I will rephrase the question. The question is, did there occur a change in that area over these various years as to what you could log, what you could utilize?

“A. That’s right.

“Q. What was that change?

“A. Well, when we started logging second-growth we just didn’t log it.

“Q. Why not?

“A. Well, there was no profit in it.

“Q. Could you get rid of it?

“A. Oh, you could give it away.”

Appellee produced absolutely no evidence that the second growth timber on appellant’s property was merchantable in May of 1942. Each of its witnesses testified that second growth timber was used to some extent in 1942 and that some salable products were made from second growth timber at that time (R. 252, 296, 325, 342, 356). However, on cross-examination it developed that the timber which was being utilized was easily accessible and close to a *public* road (R. 334-335). As a general rule in 1942, second growth logging was avoided (R. 347).

The first sale of second growth timber by the United States Forest Service occurred in 1943 (R. 166). The

first tract purchased by Weyerhaeuser Timber Company, one of the largest operators in the area, occurred in 1944 (R. 166).

Appellee and its predecessor set up a depletion account for the timber for bookkeeping and tax purposes on the basis of the Hooker cruise (Exs. 18 A, 18 B).

In 1949 appellee's predecessor commenced logging operations on the property. Between 1949 and 1953 it removed the greater part of the "old growth" timber (5,880,000 board feet, leaving only 850,000 [R. 53, 59]), and a comparatively small amount of second growth (1,031,000 board feet out of a total of 4,156,000 [R. 53, 59]). After most of the old growth was removed agents of appellee's predecessor filed affidavits with the County Assessor of Lane County, swearing that all timber had been removed from this property (Ex. 4) (Under the Oregon Statutes [ORS 308.309] the filing of such affidavits removed the timber from the tax rolls). Under the contract appellee's predecessor was to pay all taxes on the timber.

The fact that appellee knew it did not own the second growth timber graphically appears from the stipulated findings concerning when the timber was removed from the property.

All the timber on the property was removed between 1949 and 1956, as follows (R. 53):

"Description	M Board Feet
Old growth Douglas fir.....	6,730
Second growth Douglas fir.....	4,156 "

After January 1, 1953, the following volume was removed (R. 59):

"Species	M Board Feet
Old growth fir.....	850
Second growth fir.....	3,125 "

It is therefore clear that before 1953 nearly all of the old growth was removed. Then in and after 1953 most of the second growth was removed.

The rise in values of second growth timber during that time explains why appellee cut it. It was stipulated that the stumpage values for the timber on appellant's property for the years involved were as follows (R. 54):

"Description	1950	1951	1952	1953	1954	1955
	*	*	*	*	*	
Second growth Douglas fir	5	9	14	19	24	25-30"

There is absolutely no evidence that this inaccessible second growth timber was merchantable in May of 1942. All of the evidence is to the contrary, including

the conduct of appellee's predecessor and appellee regarding the timber.

The trial court ignored and refused to recognize the undisputed evidence and the clear and unmistakable Oregon law. Consequently, it must be reversed and directed to enter judgment in favor of appellant for three times the value of all timber which was removed from appellant's property after January 1, 1953.

IV

When appellee's predecessor passed over the second growth on the first cutting and swore to and filed with the County Assessor the timber removal affidavits it thereby abandoned all timber then remaining on the property.

The majority of the timber removal affidavits were filed and sworn to by witness Frank W. McPherson, the logging superintendent of appellee's predecessor. After considerable interrogation, it was developed that he was the man with authority to file them (R. 398):

"Q. [By Mr. Dezendorf]: In 1950, as I understand it, you were the logging superintendent for Siuslaw; is that correct, Mr. McPherson?

"A. That is correct.

"Q. So that you had charge of the logging operations that were conducted, is that correct?

"A. That's right.

“Q. Did you consider it a part of your duties to file the timber affidavits at that time, after the logging had been completed?

“A. Yes.”

It conclusively appears that there was no doubt in McPherson's mind as to the facts when he made out the affidavits saying that all timber had been removed from this property.

Exhibit 4 contains exact copies of all papers in the file of the Lane County Assessor, relating to appellant's property. On *January 4, 1951*, the County Assessor wrote a letter to Mr. McPherson asking for a clarification of some of the information contained in the timber removal affidavits which had already been filed. McPherson replied: *“I do not understand your request as all timber has been removed from the reported lands * * *. The state law requires that we leave seed, trees, etc. on all timber lands which we do but we do not consider this as merchantable timber after the tract is logged.”*

This certainly belies appellee's position and the trial court's findings.

As pointed out in the Argument under Point III immediately above, these affidavits were filed between 1949 and 1951, after substantially all of the old growth

timber (all but 850,000 board feet) was removed from the property. This constitutes conclusive evidence that appellee's predecessor abandoned the second growth timber which remained in 1950.

The consequences of such action have been clearly announced by the Oregon Supreme Court, but the trial judge refused to apply the Oregon law as established by the Oregon Supreme Court in this case.

A case directly in point holding that the filing of timber removal affidavits constitutes abandonment of the timber then remaining is *Hughes v. Heppner Lumber Co.*, 205 Or 11, 283 P2d 142, 286 P2d 126. In this case defendant's predecessor purchased "all pine and merchantable fir timber" located on certain land in eastern Oregon in the year 1939. Between 1939 and 1948 defendant logged on the property and then did nothing until 1951, when it indicated an intention to resume logging operations. The plaintiff thereupon brought suit to quiet title to his land, contending that all of the timber which passed under the 1939 grant had been removed. It appeared that by 1948 defendant's agents had filed timber removal affidavits as to all of the property. With respect to the effect of these affidavits, the Supreme Court of Oregon said, at page 18:

"* * * The defendant does not dispute the making of the affidavits but attempts to evade their eviden-

tiary value by claiming that they were misled by the reports of the loggers.”

and at page 19:

“It is clear to us from a close scrutiny of the record that when defendant’s officers and employees signed the affidavits they knew what they were doing.”

In response to a petition for rehearing, the Supreme Court of Oregon wrote another opinion, commenting on the effect of the timber removal affidavits. It said, at page 58:

“It will be remembered that defendant was paying taxes on the timber and in order to remove its obligation the affidavits were executed. Because the officers and directors of the defendant company testified that they were misled when they signed the affidavits does not necessarily establish that fact. The record itself, in our opinion, belies their testimony. Four affidavits were filed with the assessor by P. W. Mahoney, attorney for and an original incorporator of the defendant company. He was its director and became its secretary in 1942. As to the foundation for his affidavits, we have his testimony:

“ ‘Q What you know about whether the timber came off or not is from reports to you by employees, is that right?

“ ‘A By employees and independent gypo contractors.’

“Orville Smith, vice-president and general manager of the company, executed one affidavit. He testified that he had done logging himself and that he was through this property any number of times between 1939 and 1951. The other affidavit was made by Allen L. Piper, forester of the company, who executed his affidavit after the defendant admittedly had examined the property.

“To give credence to their testimony we would have to find defendant’s employees and contractors guilty of fraud and deceit. In addition there would have been another fraud perpetrated on the county in depriving it of its taxes. We are inclined to believe that the testimony of these officers was prompted by a desire to profit because of the skyrocketing of timber prices some four years after it ceased operations. Their memories were obviously faulty.”

Precisely the same situation exists in the instant case. Even between 1950 and 1953 the value of the second growth timber on appellant’s property increased from \$5.00 per thousand to \$19.00 per thousand. It is clear that in 1949 and 1950, when the affidavits were filed, appellee’s predecessor intended to abandon the property and did not intend to go back and log the second growth. However, after the price of the second growth had appreciated over four times, it then appeared profitable for appellee to go in and cut the timber and it did so.

The Supreme Court of Oregon has held in no uncertain terms that private parties will not be allowed to take one position against the sovereign to evade taxes and then be permitted to testify in a civil action that the facts stated in papers filed with the sovereign were not true. In *Kergil v. Central Oregon Fir Supply Company*, 213 Or 186, 323 P2d 947 (1958), plaintiff sued defendant for the alleged balance due as rental for certain motor vehicles he had leased to defendant. Defendant attempted to show that the written leases of the motor vehicles were a mere sham to avoid paying the federal transportation tax, and that, in fact, plaintiff had already been paid in full for the use of the trucks in accordance with an oral agreement between the parties. The Supreme Court held that defendant could not make this showing because a party cannot defend himself with the claim he was actually defrauding a third person, especially the sovereign. The court pointed out that some courts will permit such proof and rejected the rule, saying, at page 189:

“The difficulty with this view is that it overlooks the moral aspects of the situation. It permits the law to be used to lend its aid to those who would mislead or defraud third parties without providing any restraining penalty upon their immoral actions.”

Here we have appellee's predecessor filing the timber removal affidavits with the County Assessor of Lane County, Oregon, admittedly to relieve itself of the obligation to pay taxes on the timber, and then its successor comes into court and claims that timber did remain on the property. Under Oregon law, this cannot be done.

As a matter of law, the filing of the affidavits constituted an abandonment of any timber remaining on the property at the time the affidavits were filed. For this reason alone, the trial court must be reversed.

V

Under the law of Oregon, the cutting of the second growth timber was willful and without right and, consequently, appellant is entitled to recover treble damages for the cutting and removal of it.

The Oregon statutes relating to damages for the wrongful removal of trees are ORS 105.810, which says:

“Except as provided in ORS 477.310 [not applicable], whenever any person, without lawful authority, wilfully injures or severs from the land of another any produce thereof or cuts down, girdles or otherwise injures or carries off any tree, timber or shrub on the land of another person, * * * in an action by such person, * * * against the person committing such trespasses if judgment is given for the plaintiff, it shall be given for treble the amount of damages claimed, or assessed for the trespass. In

any such action, upon plaintiff's proof of his ownership of the premises and the commission by the defendant of any of the acts mentioned in this section, it is prima facie evidence that the acts were committed by the defendant wilfully, intentionally and without plaintiff's consent."

and ORS 105.815, which says:

"When double damages are awarded for trespass. If, upon the trial of an action included in ORS 105.810, it appears that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which the trespass was committed was his own or the land of the person in whose service or by whose direction the act was done, or that the tree or timber was taken from uninclosed woodland for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall be given for double damages."

In this case, it is clear from appellee's conduct that its removal of the second growth timber was wilful and intentional, and there is no evidence that it was casual or involuntary or that it had any probable cause to believe that it owned the timber. Its predecessor had, in fact, already filed the removal affidavits and had removed substantially all of the old growth which it bought. Its conduct prior to 1950 clearly indicates its own belief that it did not own the second growth.

The double damage statute, ORS 105.815, was construed in the early case of *Loewenberg v. Rosenthal*, 18 Or 178, 23 P 601 (1899) (at that time it provided for only single damages). In that case, the Supreme Court said, at pages 186-188:

“* * * If said section 338 of the Code stood alone, the court would be called upon to construe it, and it might, in that case, adopt the construction contended for by the counsel, but we are spared that labor, as said section 339, as will be seen, points out the circumstances under which no more than single damages can be recovered. The legislature, by the latter section, has given a construction to the former one—has prescribed the cases in which such trespasser shall be liable for single damages only, and leaves him in all other cases liable to treble damages as prescribed in the former section; and if the courts were to attempt to make other exceptions in favor of the trespasser than those specified in said latter section, it would be an encroachment upon legislative functions. Hence the finding of the jury that the appellants had probable cause to believe, and did believe, when they carried off the wood from the land in question, that the owners of the land had authorized them to take and carry it away, was wholly immaterial and irrelevant. Their having taken and carried away the wood without lawful authority, and converted it to their own use, was not a casual or involuntary trespass, but a deliberate act upon their part, and any belief they might entertain regarding their right to do so could not avail them as a defense against a recovery of punitive damages, unless they had probable cause to believe that they were taking it from their own land, or that of the person in whose service or by whose direction the act was done, or unless they took the

wood under the other circumstances, and for the purposes mentioned in said section 339. The statute declares the circumstances under which the punitive liability attaches, and those which will exempt a party from it, and the courts have no discretion but to administer its provisions.

“The finding of the jury, under the third special finding, brings the case within said section 338, and none of the other findings take it out of the provisions of that section. The statute was enacted for a good and wise purpose; it was intended to prevent parties from recklessly going upon the lands of others, and cutting and carrying away their wood and timber. It is liable, like all laws, by reason of their universality, to work a hardship in particular cases, but generally it will, no doubt, operate as a wholesome regulation. The appellants in this case very likely think that they ought not to be required to pay anything more for the wood and timber taken and carried away by them than its actual value, as they had probable cause to believe, and did believe, when they carried it away, that the owners of the land had authorized them to do so. They could, however, have easily ascertained whether or not such was the real fact by consulting such owners, and if they had done so before engaging in the affair they would have avoided the difficulty in which they have become involved. A party should not, under such circumstances, rely upon what some other person informs him regarding such a matter. He should go to the owner of the property, and have his information verified, before he begins taking and carrying it away. I think respondents were entitled to have their damages for taking and carrying away the wood and timber in question trebled. * * *

In *Longview Fiber Co. v. Johnston*, 193 Or 385, 238 P2d 722 (1951), the court said, at pages 399 and 400:

“Finally, defendant argues that, in an action for trespass upon real property, when the plaintiff contends that the physical evidence of the original location of a section corner upon which the fact and extent of the trespass depend has been lost, and attempts to determine and reestablish the location of such corner by the testimony of his own employees upon the theory of proportional measurement rather than by the reestablishment of the original corner and line, the court may not find the defendant guilty of trespass, if, prior to the relocation of such line, he did not cut timber beyond a line claimed by him to be the original section line, of which line plaintiff had knowledge, and concerning which there was no dispute, since, until such new line was established by law, there could be no trespass over it.

“The argument is rather involved, but, in any event, it does not appear to be in point. There was no evidence in the case that, prior to the trespass, defendant had claimed any particular line to be the original section line, or that plaintiff ever had notice of any such claim. Moreover, as we have stated, there was no evidence that defendant made any effort to locate the boundary line prior to the trespass. The suggestion that until a new line was established by law the defendant could not be guilty of trespass over such line cannot be accepted. There was at all times a boundary line between the lands of plaintiff and those of defendant. Its exact location may not have been susceptible of determination from existing physical evidences at the time of the trespass, but at all times the location could have been reestablished by survey.

“It was defendant’s duty to have determined in advance the exact location of his boundary line. There is no evidence that he made any attempt whatever to do so until after his cutting of timber upon plaintiff’s land had been called in question. This fact tends rather to aggravate the trespass than to excuse it.”

Witness Frank W. McPherson, logging superintendent of appellee’s predecessor, and appellee testified that although he was familiar with the terms of the May 4, 1942 contract, appellee and its predecessor treated appellant’s property exactly as if they owned the fee title to the land and logged it without regard to the merchantability qualification of the contract. McPherson testified (R. 412):

“Q. Now, as I understand your statement on direct, Mr. McPherson, you said that you conducted the logging operations on the Seaver property just the same as were conducted on other properties which was owned in fee by Siuslaw or U. S. Plywood. Did I understand you correctly?

“A. That would be about right, yes. Every tract has its own peculiarities.

“Q. But I mean with respect to the selection of trees, and things of that kind, you logged it just the same as you did property that you owned in fee?

“A. Within reason, yes.

“Q. You intended to take whatever trees were actually taken from the Seaver tract, is that correct?

“A. I would say yes.”

and (R. 414):

“Q. All right. I take it, Mr. McPherson, that when the second-growth timber was taken from the Seaver land in the period 1951 to 1955 that you intended to take it and knew what you were taking; is that correct?

“A. That is correct.

“Q. When, if ever, Mr. McPherson, did you examine the Warlick-Siuslaw May 4, 1942, contract?

“A. Well, we had it in our records there all the time.

“Q. Were you familiar with it all the time?

“A. During the time of this operation, speaking about '49-'50, I'd say Yes.

“Q. So that you were familiar with the terms of the May 4, 1942, contract during the time that logging operations were performed on the Seaver tract?

“A. Yes.

“Q. And it was right in your file?

“A. In our file.

“Q. And even with that you conducted your logging operations on the Seaver property just as if you owned the fee, is that right?

“A. That is right.”

The evidence in this case will support no other conclusion but that appellee knew that it did not own the second growth timber on appellant's property. Its predecessor had already abandoned the second growth.

When it then went upon the property and removed the substantial majority of the second growth after 1950, it was acting wilfully and is liable for treble damages.

VI

There is no evidence in this case that appellant consented to appellee's removal of the second growth timber from his property.

Appellant testified (R. 107):

"Q. (By Mr. Dezendorf): Mr. Seaver, when did you first find out that you had a claim against the defendant or its predecessor for taking timber from this property to which they were not entitled?

"A. That was in early spring of 1956.

"Q. How did you find it out then?

"A. I went to Mr. Hoffman and talked to him.

"Q. He is the Mr. Hoffman who is your attorney in this case?

"A. My attorney, yes."

and (R. 132-133):

"Q. (By Mr. Biggs): The lawsuit that Mr. Hoffman was authorized to start for you, this lawsuit, this trespass case, was based upon your claim and his advice to you, wasn't it, that the U. S. Plywood was trespassing because they had not completed their logging operations within five years after they started; isn't that correct?

"A. Yes.

“Q. He didn’t, then, advise you and you didn’t request advice or didn’t assume that you had any right for damages against U. S. Plywood because of the removal of any non-merchantable trees, did you?

“Mr. Dezendorf: If the Court please, I would have to object to that. This case started out as a trespass case and it still is a trespass case.

“The Court: I don’t know what the relevancy would be, anyway. Suppose this man didn’t know all of his right? Does it mean that he can’t assert them now?

“Mr. Biggs: No, your Honor; not at all. I just simply want to show that until the amended complaint was filed here nobody who had any connection with this tract of timber from—”

The elements necessary to establish an estoppel are clearly stated by the Oregon Supreme Court in *Bennett v. City of Salem et al*, 192 Or 531, 235 P2d 772, at page 541:

“To constitute an equitable estoppel, or estoppel by conduct, (1) there must be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; and (5) the other party must have been induced to act upon it. (Cites)”

The undisputed testimony above set out discloses that appellant did not learn until he contacted his at-

torney in the spring of 1956 that appellee and its predecessor were only entitled to remove such timber as was merchantable on May 4, 1942.

Thus, it was not until after all the timber in question had been removed that appellant was advised of his rights.

There is no evidence in the record, and none can be produced, to show that appellee or its predecessor changed its position in any way in reliance upon any action or inaction of appellant which took place after appellant first learned that appellee and its predecessor had taken timber from his land to which they were not entitled. On the contrary, all of the evidence shows that appellee knew at all times that it did not own the second growth timber on appellant's property and that it had no right to remove it. It in no way relied on appellant's action or inaction in pursuing the conduct it chose. Therefore, it cannot excuse itself from its clear trespass by a belated claim that it was misled by appellant.

VII

As a matter of law, evidence of the alleged "actual" intent of appellant's and appellee's predecessors when they negotiated the 1942 contract was inadmissible.

Under the law of Oregon the words "merchantable timber" are not ambiguous. They have a well-understood meaning of "timber which has a commercial

value” considering all the facts and surrounding circumstances. See *Hughes v. Heppner Lumber Co.*, supra, and *Doherty v. Harris Pine Mills, Inc.*, supra. As a matter of fact, in the *Doherty* case the contract involved was held ambiguous because of several inconsistent terms contained in it. It did use the words “merchantable timber.” Concerning this part of the contract, the Supreme Court said:

“Considered alone this paragraph [merchantable timber] would appear to be clear and unambiguous * * *”

Since the contract is not ambiguous, parol evidence is not admissible to vary its terms.

The Oregon parol evidence rule appears in a statute, ORS 41.740, which says:

“When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except where a mistake or imperfection of the writing is put in issue by the pleadings or where the validity of the agreement is the fact in dispute. However this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in ORS 42.220, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. * * *”

In the case of *Elliott et ux v. Tallmadge*, 207 Or 428, 297 P2d 310 (1956), there was a contest between a purchaser of real property at a mortgage foreclosure sale and a trustee in bankruptcy of the mortgagor for title to some refrigerators and ranges in an apartment house. Both the mortgagor and the mortgagee testified that they intended to include this equipment in the real property mortgage and thus, the foreclosure purchaser claimed it. The Supreme Court of Oregon held as a matter of law that the property was personalty and belonged to the trustee in bankruptcy. After discussing another case, the court said, at page 431:

“We can see no distinction in the two cases, with the one exception that in the present case both the mortgagee and mortgagor testified that when the mortgage was given it was the intention of the parties that the ranges and refrigerators were to become a part of the realty. This evidence was not admissible, but even if it were, it would not be controlling * * *.”

In *Taylor et ux v. Wells et ux*, 188 Or 648, 217 P2d 236 (1950), it was held that an option could not be shown to have been meant to be the right to buy if the sellers decided to sell. The court held the option absolute as it read. The lower court was reversed for failing to enforce the agreement and admitting parol evidence to explain it. The Supreme Court of Oregon said, at page 659:

“The rule which prohibits the modification [sic] of a written contract by parol evidence (§ 2-214, O.C.L.A.) ‘is not one merely of evidence, but is one of positive or substantive law founded upon the substantive rights of the parties.’ (Cites) Evidence properly falling within the inhibition of the rule does not become admissible merely because it has probative value or is not objected to. (Cites)

“It is said in 32 C.J.S., Evidence, § 863, that there is a conflict of authority as to whether parol evidence which is inadmissible because it varies or contradicts [sic] a writing, but which has been admitted without objection, must on the one hand, be considered and given its due effect, or on the other hand, must be disregarded, in the trial court.’ The weight of authority supports the rule that such evidence should be disregarded. Especially is this true in those jurisdictions where it is held that the parol evidence rule is one of substantive law and not one of evidence merely. (Cites)

“In our opinion all the parol evidence which tended in any way to vary or contradict the written option should be disregarded and the written option should be specifically enforced.”

In *Webster et ux v. Harris*, 189 Or 671, 222 P2d 644 (1950), plaintiff and defendant entered into a written agreement whereby defendant agreed to sell plaintiff 4,000,000 feet of logs. Plaintiff sued, claiming the parties had orally agreed that the logs should come from a certain tract of land and that defendant had breached the agreement. The Supreme Court held as a matter of law that the oral agreement or modification of the written contract could not be proved, saying:

“The written contract appearing on its face to be complete, and no issue having been made respecting its validity, or that it embodied a mistake or imperfection, it is to be considered as containing all of the terms of the agreement, and no evidence thereof was admissible between the parties other than the writing itself. (Cites) The parol evidence rule embodied in the code * * * is one of substantive law. (Cites) * * * Plaintiff’s case was based upon the pleaded oral modification of the integrated written contract, and, such modification being inadmissible as a matter of substantive law, the complaint failed to state facts sufficient to constitute a cause of action, * * *.”

In this case, as has been demonstrated above, under the law of Oregon “merchantable timber” is a well-understood and unambiguous term. Therefore, parol evidence is not admissible to show that the parties actually meant those words to include all timber on the property, whether it had a commercial value at the time or not. The trial court should not have admitted this evidence, and this evidence can afford no basis for the trial court’s conclusion that the second growth timber passed under the 1942 contract.

CONCLUSION

In 1942 appellee’s predecessor purchased all “merchantable” timber on appellant’s property. Between 1949 and 1951 it cut and removed substantially all of

the old growth timber on the property which, under the only evidence in this case, constituted all merchantable timber on the property as of May 4, 1942. Thereafter, appellee returned to the property and cut and removed over 3,000,000 feet of second growth timber. The only possible conclusion to be drawn from the record in this case was that appellee acted wrongfully when it cut and removed second growth timber in and after 1953. The trial court must be reversed and directed to enter a Judgment for appellant.

Respectfully submitted,

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APPENDIX OF EXHIBITS

EXHIBIT	IDENTIFIED	OFFERED AND RECEIVED	RE- JECTED
1	108-109	108-109	
2	108	108	
3	109	109	
3	109	109	
4	109	109	
5	110	109-110	
6	108	108	
7	110, 147, 148	153	
8	110, 153-154	111	
9	111	111, 155	
12-A-12-O	112	113, 478-484	
14	113	491	
15	113	491	
16A-16D	113	491	
18A-18B	114	114	
20A, 20B	115, 468	115	
30A	248	248	
30B	288	434, 435	
31	115	115	
32A	386	386	
32B	386, 434	386	
33	236	236	
51		177, 182	

EXHIBIT	IDENTIFIED	OFFERED AND RECEIVED	RE- JECTED
52	184	177, 182	
53	268	177, 182	
54		177, 182	
56		177, 182	
59		178, 182	
60		178, 182	
63		178, 182	
64		178	
65	135	135	
66		178, 182	
67	427	178, 182	
68	126, 127	127	
69	126	129	
70		179	
71		179	
72	125	126	
73	125	126	
74		179	
75		179	Stricken 187
76	467	489	
77	187	187	
78	225	226	

No. 16357

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN N. SEAVER, JR.,

Appellant,

v.

UNITED STATES PLYWOOD CORPORATION,

Appellee.

APPELLEE'S BRIEF

*Appeal from the United States District Court
for the District of Oregon*

HONORABLE GUS J. SOLOMON, Judge

FILED

JUL 20 1959

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No. 16357

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN N. SEAVER, JR.,

Appellant,

v.

UNITED STATES PLYWOOD CORPORATION,

Appellee.

APPELLEE'S BRIEF

*Appeal from the United States District Court
for the District of Oregon*

HONORABLE GUS J. SOLOMON, Judge

STATEMENT OF THE CASE

In this action, which was removed from the Circuit Court for Lane County, Oregon, plaintiff appeals from a judgment in his favor for \$80.00 (R. 65) entered upon findings of fact and conclusions made by the court after trial before the court, a jury having been waived (R. 49-64). By an amended complaint filed on November 23, 1956 (R. 5), plaintiff sought to recover \$300,000

as treble damages for alleged timber trespasses by defendant's predecessor in interest (Siuslaw Forest Products, Inc., hereinafter called "Siuslaw") and defendant upon plaintiff's lands in Lane County, Oregon.

While it was alleged therein that over 5,000,000 feet of old growth and second growth fir and hemlock trees and timber, and other species of trees and timber, were wilfully cut and removed between June 24, 1950, and August 10, 1955, the timber trespass claim was narrowed at trial to a claim for recovery on account of 850,000 feet of old growth fir, 3,125,000 feet of second growth fir, 431,000 feet of hemlock, and 8,000 feet of cedar, stipulated to have been cut and removed from the property between January 1, 1953, and December 30, 1955 (R. 488). The theory of plaintiff's action was that the timber sales agreement of May 4, 1942, between the Warlicks, then owners of the property, and Siuslaw, under which "all of the merchantable old growth and second growth fir and hemlock timber either standing or down and now growing or located" was sold, did not give Siuslaw or defendant the right to cut any second growth fir and hemlock subsequent to January 1, 1953, because such timber was not "merchantable" at the time of the execution of the contract. In the alternative, plaintiff asserted that if there was any merchantable timber left on the land, defendant or Siuslaw abandoned or relinquished its interest therein prior to June 24, 1950 (R. 14-15). At the commencement of the trial, defendant's counsel conceded liability for the cutting of the cedar, not mentioned in the timber sales agreement. Following the closing of the testi-

mony and arguments, the court rendered its oral opinion (R. 494-501) limiting plaintiff's recovery to double damages of \$80.00 for "cutting down five cedar trees in a tract of 400 acres" (R. 500).

The court rejected all plaintiff's other claims, although it rigidly followed the rule of *Hughes v. Heppner Lumber Company*, 205 Or. 11, 283 P.(2d) 142, 286 P.(2d) 126, that "a grant of merchantable timber is a grant only of the merchantable timber on the land as of the date of the contract" (R. 496). The court held that whether the agreement of May 4, 1942, be construed ". . . by its wording alone or whether we construe it in the light of the position of the parties" the grant of timber therein included all of the second growth fir and hemlock removed by defendant and Siuslaw.

With respect to the alternative claim that defendant or Siuslaw had abandoned or relinquished its interest in any merchantable timber left on the land on June 24, 1950 (R. 15), the court unequivocally held that there had been no abandonment of any timber. In making this determination, the court characterized defendant's principal witness on this point as "a particularly good witness," and stated that it was impressed with his testimony (R. 495).

STATUTES INVOLVED

The Oregon statute on which the amended complaint was founded is ORS 105.810:

“Treble damages for injury to or removal of produce, trees or shrubs. Except as provided in ORS 477.310, whenever any person, without lawful authority, wilfully injures or severs from the land of another any produce thereof or cuts down, girdles or otherwise injures or carries off any tree, timber or shrub on the land of another person, or of the state, county, United States or any public corporation, or on the street or highway in front of any person’s house, or in any village, town or city lot, or cultivated grounds, or on the common or public grounds of any village, town or city, or on the street or highway in front thereof, in an action by such person, village, town, city, the United States, state, county, or public corporation, against the person committing such trespasses if judgment is given for the plaintiff, it shall be given for treble the amount of damages claimed, or assessed for the trespass. In any such action, upon plaintiff’s proof of his ownership of the premises and the commission by the defendant of any of the acts mentioned in this section, it is prima facie evidence that the acts were committed by the defendant wilfully, intentionally and without plaintiff’s consent.”

The statute on which the judgment was based is ORS 105.815:

“When double damages are awarded for trespass. If, upon the trial of an action included in ORS 105.810, it appears that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which the trespass was committed was his own or the land of the person in whose service or by whose direction

the act was done, or that the tree or timber was taken from uninclosed woodland for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall be given for double damages."

SUMMARY OF ARGUMENT

1. The scope of this Court's review of the findings of fact is limited by Rule 52(a) of the Federal Rules of Civil Procedure and the decisions of this Court interpreting its mandate.

2. Those findings of fact which were not stipulated are supported by substantial evidence. To a large degree, they are dependent upon the trial court's appraisal of the credibility of oral testimony.

3. The trial court correctly applied the controlling Oregon law in connection with its factual determination that the fir and hemlock timber in question was "merchantable" in May, 1942, and that it had not been abandoned by the defendant or Siuslaw.

4. The court below correctly concluded that plaintiff by his conduct had manifested consent to the removal of the timber in question, notwithstanding the claim that he was acting pursuant to a mistaken interpretation of his contractual rights.

5. Under no circumstances could defendant be liable for treble damages, in the absence of a finding of malice and evil intent.

6. This Court should accept the experienced trial judge's interpretation of the Oregon statutes and the decisions of the Supreme Court of Oregon.

ARGUMENT

I

The scope of this Court's review is restricted by Rule 52(a) of the Federal Rules of Civil Procedure.

In his specification of errors, plaintiff complains of error with respect to thirteen separate findings of fact made by the trial court (App. br. 5-14). Since thirteen out of twenty-eight findings entered were based on stipulated facts, plaintiff complains of all findings other than these agreed facts, except Finding XV and Finding XXII (R. 56, 59-60). In most instances, it is baldly stated that there was no evidence to support the particular finding (App. br. 5, 10, 11, 13, 15). However, when the alleged errors are analyzed, it becomes clear that plaintiff's principal complaint is that the court believed the oral testimony given by defendant's witnesses and weighed the evidence in its favor.

On appeal, that view of the evidence which is most favorable to defendant must be accepted, and if, when so viewed, the findings are supported by substantial evidence, they will be sustained (*Lewis Food Company of California v. Milwaukee Ins. Co.*, 257 F.(2d) 525 (CA 9); *Elrick Rim Company v. Reading Tire Machinery Co.*, 264 F.(2d) 481 (CA 9)). Since it was within the exclusive province of the trial court to appraise the credibility of the witnesses, those findings which depend upon the credibility of oral testimony will be regarded as conclusive on appeal (*Parker v. Title & Trust Com-*

pany, 233 F.(2d) 505 (CA 9); *E. V. Prentice Machinery Company v. Associated Plywood Mills, Inc.*, 252 F.(2d) 473, cert. den. 356 U.S. 951, 78 S. Ct. 917, 2 L. Ed. 2d 844). Furthermore, it is not this Court's function to test the findings through a weighing of the evidence, or to substitute its judgment for that of the trial court, even though of the opinion that the district judge could have reached a contrary conclusion (*Kirsch v. Huber*, 264 F.(2d) 387 (CA 9)).

In view of the lower court's oral opinion rendered immediately after the close of the evidence and arguments, the statement in *Tonkoff v. Barr*, 245 F.(2d) 742 (CA 9), is pertinent (p. 750):

"The foregoing references to the testimony make it apparent that there was substantial evidence upon which the trial court properly could make the findings he did. His short but revealing memorandum decision indicates that the trial judge considered the motives and other indicia of credibility as applied to the various witnesses and was impressed with that evidence which sustained appellees' position. Under such circumstances it is not our function to substitute our judgment for that of the trial court [citations]."

II

The trial court's findings as to the merchantability of the fir and hemlock timber on May 4, 1942, are supported by competent evidence.

In a comprehensive pretrial order, the parties framed the first issue of fact as follows (R. 19):

"How much of the fir and hemlock timber, if any, removed by defendant and its predecessor in interest within the limitations periods applicable to this action, was not merchantable within the meaning of the May 4, 1942, contract?"

In Finding of Fact XXI (R. 59) the court found:

"According to the prevailing standards of merchantability in the area, all of the fir and hemlock timber removed by defendant and Siuslaw as above stated was in fact merchantable on May 4, 1942."

This ultimate finding, as well as the more detailed findings on merchantability (Findings of Fact XII, XIII, XIV, XVI, XVII, R. 54-58), is challenged on the ground of lack of supporting evidence and the admission of oral testimony in violation of the Oregon parol evidence rule.

Before discussing the evidence supporting these findings, it is necessary to review briefly the controlling Oregon authorities and our agreement or disagreement with plaintiff's view of the Oregon law:

FIRST: Plaintiff utilizes nearly eight pages of his brief (App. br. pp. 21-29) to argue that under the decisions of *Hughes v. Heppner Lumber Company*, 205 Or.

11, 283 P.(2d) 142, 286 P.(2d) 126, and *Doherty v. Harris Pine Mills, Inc.*, 211 Or. 378, 315 P.(2d) 566, defendant and Siuslaw only acquired title to timber on the property which was merchantable as of May 4, 1942, the date of the timber agreement. However, there is no issue on this appeal as to the application of that rule of law. In its oral opinion the court followed these cited decisions (R. 496), and specifically found that all the fir and hemlock timber removed "was in fact merchantable on May 4, 1942" (R. 59).

SECOND: Plaintiff erroneously claims that under the Oregon decisions "merchantable" timber is "only timber which has a commercial value and which can be utilized at a profit" (App. br. pp. 20, 29). In *Monger v. Dimmick*, 187 Or. 253, 257, 210 P.(2d) 929, "merchantable timber" was defined as "all timber . . . that had . . . a commercial value in that locality for the purpose of manufacture into lumber, or for any other purpose." This definition was quoted with approval in *Hughes v. Heppner Lumber Co.* (supra), and in *Doherty v. Harris Pine Mills, Inc.* (supra). However, the plaintiff's attempted incorporation of the additional factor of utilization for a profit is absolutely contrary to Oregon law, as stated in the leading case of *Dahl v. Crain*, 193 Or. 207, 237 P.(2d) 939. There, the Oregon Supreme Court held that a timber seller was entitled to rescind for fraud a transaction based upon a so-called joint timber cruise. The court's holding was based upon the fact that the parties had agreed upon a sale of merchantable pine timber on the basis of the cruise, but the buyer had instructed the cruiser, Mr. Milius, to count

only the timber which would return a net profit to the buyer in his contemplated operation. The court held (p. 225):

“We know of no authority, nor has any been cited to us, that defines ‘merchantable timber’ to be only such as that contained in the instructions given *Milius*.”

THIRD: Appellant claims that under Oregon law the words “merchantable timber” are not ambiguous and that the trial court erred in admitting extrinsic evidence to show that the contracting parties intended those words to include all timber on the property (App. br. 17-20, 55-59). However, the decision in *Doherty v. Harris Pine Mills, Inc.*, 211 Or. 378, 315 P.(2d) 566, is clear authority to the contrary. There the Oregon court stated (pp. 398-399, 402-403):

“In *Hughes v. Heppner Lumber Co.*, 205 Or 11, 15, 283 P2d 142, 286 P2d 126, this court said: ‘What is merchantable timber, in the absence of agreement, is a question of fact.’ Again, in the opinion on rehearing, the court said:

“‘As pointed out in *Dahl v. Crain*, 193 Or 207, 237 P2d 939, it is difficult to define merchantable timber which will fit all occasions in all localities. It has no definite fixed meaning and many factors must be considered in a given case in determining what is or is not merchantable.’ 205 Or at 57.

“In *Dahl v. Crain*, *supra*, 193 Or 207, 225, 237 P2d 939, this court said:

“‘It may be conceded that there is no definition of “merchantable timber” which will fit all occasions and all localities. Although a term very frequently used in timber sales contracts, as it was used in the contract here, nevertheless, it

is one having no definite and fixed meaning. What may be "merchantable timber" at one time or place may not be deemed such at another time or place. In determining what is covered by the term at a particular time and in a particular locality many factors are considered. Size and quality are of prime importance. Location, accessibility, demand, and market conditions are regarded. We do not assume to enumerate all the elements involved in the term. * * * '

"Again, in *Parsons v. Boggie*, 139 Or 469, 11 P2d 280, the contract called for the sale of 'all good merchantable timber' on certain land. This court said:

" ' * * * The court must, as far as possible, construe the instrument from the words used as showing what the parties had in mind at the time of its execution. The respondent sold and the appellant bought with the understanding that the timber was to be removed. We must also take into consideration the circumstances surrounding the parties at the time the sale was made; also their attitude toward the subject matter subsequent to the execution of the contract. * * * '

"The conclusion to be drawn from these cases is that the term 'merchantable timber' in and of itself involves some ambiguity requiring a consideration of the surrounding circumstances and the 'attitude toward the subject matter subsequent to the execution of the contract', i.e., the practical construction placed upon the contract by the parties."

* * * * *

"The trial court having correctly found that the contract was ambiguous proceeded to take testimony for the purpose of ascertaining the true intent and meaning of the contract under the rules governing construction in cases of ambiguity. In such an inquiry it was the duty of the court to consider all

circumstances accompanying or surrounding the transaction, giving great weight to the principal apparent purpose of the parties, and so far as possible, placing itself in the position of the contracting parties. ORS 42.220; *Barmeier v. Oregon Physicians' Service*, 194 Or 659, 672, 673, 243 P2d 1053; *Erickson v. Grande Ronde Lumber Co.*, 162 Or 556, 580, 92 P2d 170, 94 P2d 139; *Haynes v. Douglas Fir Exploitation and Export Co.*, 161 Or 538 at 549, 90 P2d 207, 761; *Teiser v. Swirsky*, 137 Or 595 at 604, 2 P2d 920, 4 P2d 322; *Jaloff v. United Auto Indemnity Exchange*, 120 Or 381, 388, 250 P 717. The court must be guided by the familiar provisions of statute concerning the interpretation of writings ORS 42.210 to 42.260 inclusive. It must take note of ORS 41.740, the statutory parol evidence rule and the proviso therein that 'this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in ORS 42.220, or to explain an ambiguity, intrinsic or extrinsic, * * *.' *Garrett v. Eugene Medical Center*, 190 Or 117, 130, 224 P2d 563. It must apply the familiar rule that

"The practical interpretation of the terms of a contract made by the parties while performing it is universally deemed a safe guide to the intended meaning of the instrument.' *Kontz v. B. P. John Furniture Corp.*, 167 Or 187, 115 P2d 319.

"See also, *Miles v. S. P. & S. Railway Co.*, 176 Or 118, 125, 155 P2d 938; *Nunner v. Erickson*, 151 Or 575, 612, 51 P2d 839; *Wood v. Davin*, 122 Or 74, 78, 257 P 690; *Davis v. North Bank Dock Co.*, 294 F 336."

Thus, it is clear under Oregon law that "merchantable timber" is a term which has no definite or fixed meaning. The court is required to consider the surrounding circumstances, and the practical construction placed

upon the contract by the parties subsequent to its execution in arriving at their intent. In determining what is covered by the term, the court must take into consideration various factors, including size, quality, location, accessibility, demand and market conditions. Only after the court has determined what is "merchantable" does the rule apply that the grant of merchantable timber is that which was on the land at the date of the contract.

The court's opinion (R. 496-499), as well as its findings of fact, clearly shows the correct application of the Oregon law in its determination that all of the fir and hemlock timber removed from the lands was in fact merchantable on May 4, 1942.

A. Circumstances surrounding the sale.

Mr. Marvin T. Warlick, who made the 1942 timber contract, proposed the sale to Mr. Davidson of Siuslaw at a time when timberlands which Siuslaw owned bordered upon Warlick's land (R. 214). He insisted that he would not sell the old growth timber unless Davidson took the second growth. He believed that in the process of logging the old growth, the second growth would be pretty well cleaned out anyway (R. 215). He understood that the lump-sum price covered "all of the timber on the place" and that "There was no timber reserved" (R. 220). Plaintiff quotes Warlick as stating on cross-examination that Davidson told him Siuslaw was not interested in anything but the old growth timber and argues that the record is "abundantly clear"

that both Davidson and Warlick knew the difference between buying "merchantable timber" and all of the timber on a piece of property (App. br. pp. 31-32). However, the testimony clearly shows that the statement was made the first time they talked about a possible sale, and that the deal was consummated six, seven or eight months later following many other conversations. It was during these further negotiations that Warlick insisted that Siuslaw must take the second growth (R. 214-215).

Mr. Davidson, one of the incorporators of Siuslaw and its resident manager at Mapleton, Oregon, confirmed the fact that the only species of timber reserved from the contract was cedar (R. 276). He believed that Siuslaw was to have all of the timber (R. 282-283). Plaintiff baldly states that Mr. Davidson "... testified that he was not negotiating for the second growth timber" (App. br. p. 31), because he answered that he did not remember if there was any discussion about the second growth timber at that time (R. 275). However, the record clearly shows that counsel's time limitation referred to the time when a cruise of the timber had been completed, which was sometime prior to the making of the contract and prior to the completion of negotiations (R. 274). According to Mr. Warlick, the contract was entered into "after negotiations for a number of days or weeks" following the completion of Davidson's cruise (R. 216).

Mr. Gonyea, who was Mr. Davidson's assistant at the time, sat in on several of the discussions regarding

the 1942 timber purchase (R. 298). He testified: "There was nothing to be reserved by Mr. Warlick except a few cedar trees, as I understand or remember it" (R. 303). On cross-examination, he stated that Siuslaw acquired the timber that was on the land (R. 310). He also confirmed the discussion about second growth timber between the parties " . . . in that Mr. Davidson would bargain for the stuff" (R. 315). He could not see any inconsistency between the language of the contract and what he thought Siuslaw would get, i.e., "all of the timber" (R. 319).

That the trial court believed this testimony which was not impeached is shown by reference in its opinion to the testimony of these witnesses (R. 498).

B. Practical construction of the contract.

When Mr. Warlick sold the land to the Tucker brothers in the fall of 1942, he told them that he had sold the timber. Of course, the deed contained a specific reservation to that effect (R. 52, 227-228). Concerning a conversation with one of the Tucker brothers as to the execution of an assignment of all claims against defendant, plaintiff testified on a pretrial deposition that "he [Tucker] didn't feel like he had any [claim]" (R. 123). In fact, plaintiff admitted that at the time he bought the land from the Tuckers, he did not think he was buying any timber and Mr. Tucker did not represent that plaintiff was getting any timber (R. 119-120).

As pointed out by the court, plaintiff never claimed that second growth timber was not merchantable until

November 23, 1956, when the amended complaint was filed (R. 5), six months after the commencement of this action in the state court (R. 499). Furthermore, plaintiff does not challenge the correctness of Finding of Fact XXII to the effect that during the period he owned fee title to the lands, he requested and received reimbursement from defendant or Siuslaw of fire patrol assessments and that portion of the real property taxes allocable to the timber (R. 59-60). This reimbursement was made pursuant to the provisions of the agreement of May 4, 1942, that Siuslaw should pay "any and all taxes and fire patrol assessments or other assessments if any there be, lawfully levied and assessed against said timber (exclusive of the land) commencing with the 1942-1943 taxes throughout the life of this agreement and until the timber purchased and sold hereunder shall have been cut and removed or the same abandoned by the Vendee (Siuslaw)" (R. 51).

Finally, the logging contract between plaintiff and defendant entered into under date of August 10, 1955, provided specifically "That the Owner owns the timber on certain lands hereinafter described . . ." (Deft. Ex. 68), including portions of plaintiff's lands.

Thus, the court's explicit Finding of Fact XXIV (R. 60-61) is supported by very cogent evidence. There the court found that plaintiff's conduct in obtaining reimbursement of taxes and assessments and in failing to object to the cutting and removal of timber evidenced his "knowledge of the intention of the original parties to the contract." The court further found that by entering

into and performing the 1955 logging contract, plaintiff evidenced “. . . his understanding that all of the other fir and hemlock timber removed by defendant had been sold to Siuslaw pursuant to the terms of the contract of May 4, 1942, as understood and construed by the parties thereto” (R. 61).

C. Other facts relating to merchantability of the second growth fir and hemlock in May, 1942.

Plaintiff baldly states that the expert witnesses testified without contradiction that the second growth timber was in fact not merchantable on the date of the contract, and that defendant produced no evidence that the second growth timber on plaintiff's property was merchantable on May 4, 1942 (App. br. pp. 34, 37). Both assertions are preposterous in the light of the testimony.

The only so-called expert witnesses referred to by plaintiff are Herbert R. Jones and Fred Buss. While Jones did testify on direct examination that in his opinion the only merchantable timber in 1942 would be the old growth timber, his testimony was rendered worthless by his frank admission on cross-examination that he did not claim to be an expert on timber in Lane County in 1942, for he had not come to the county until 1941 (R. 165). He stated that one of the ultimate tests of merchantability is salability, but he had no knowledge of what the practices were in Lane County with regard to the merchantability and salability of second growth timber (R. 169).

With respect to the testimony of Mr. Buss, it is

sufficient to note that on cross-examination he admitted that in his thinking nothing was merchantable that was not profitable (R. 451). The court properly rejected this test of merchantability in line with the decision of the Supreme Court of Oregon in *Dahl v. Crain*, 193 Or. 207, 237 P.(2d) 939. In his memorandum opinion, Judge Solomon stated (R. 497):

“The mere fact that in one year, or even in several years, second-growth could not be converted into timber profitably does not render the timber unmerchantable. If that were the case, during a depression one would have to hold that the best stands of old-growth timber which were on excellent terrain, either right next to a mill or on the road, were unmerchantable because the timber could not be sold at a profit.”

Defendant's witnesses whose testimony supported the court's finding that the second growth fir and hemlock in question were of commercial value on May 4, 1942, were Wilford H. Gonyea, Arthur S. Davidson, Orval Phelps and Frank A. Graham.

Gonyea testified that in 1942 second growth timber in Lane County was made into poles and piling, as well as dimension lumber, car-decking, studs and general construction material (R. 296-297). He confirmed the fact that in 1942 there were lumber mills in Lane County which were substantially engaged in manufacturing second growth timber into lumber products (R. 304). With respect to hemlock, he testified as to the market for pulp logs used in the manufacture of paper by Crown-Zellerbach and Oregon Pulp & Paper Company (R. 305).

Davidson, who came into the Mapleton area in 1939, testified that Siuslaw was logging second growth timber in the vicinity in 1941 and that there was then a growing market for second growth poles and piling (R. 279).

Phelps, an experienced logger and lumber operator in the Mapleton area, testified as to his manufacturing activities in the early 1940's in which he utilized second growth exclusively for bridge planks and railroad ties (R. 324-328). He named several other lumber operators who were then operating in Lane County exclusively on second growth timber (R. 329).

Frank A. Graham was called to testify as to the retail market for second growth timber in Lane County in the 30's and 40's. He was questioned in some detail as to the various end products manufactured from second growth timber and emphasized the rising demand for lumber in the years immediately preceding the commencement of World War II (R. 360). Asked whether the retail market in 1941 and 1942 was just as good as the old growth retail market, the witness answered, "Definitely" (R. 360-361). He went on to describe many mills operating in Lane County in 1942 which were exclusively engaged in the manufacture of second growth lumber in the period 1940-1942 (R. 361-363).

Even plaintiff's witness Jones admitted that the second growth timber on the Seaver property was suitable for manufacture into ties, bridge decking and studding (R. 463-464).

Without reviewing the record in further detail, it is abundantly clear that the testimony of these witnesses and Mr. Gibson and Mr. Sanders adequately supports Findings of Fact XII, XIII, XIV, XVI, XX and XXI as made by the court (R. 54-56, 57, 59).

There appears to be an implication in plaintiff's brief that the finding as to merchantability is contradicted by Finding of Fact XV (R. 56), which states that the Seaver tract in 1942 was inaccessible for immediate logging in that it was located in a rugged road and rough area in which no logging roads had been constructed (App. br. p. 33). However, the record clearly shows that the immediate inaccessibility was only a temporary factor which in no sense detracted from the commercial value of the second growth fir and hemlock timber. Davidson testified that by 1942 Siuslaw's holdings extended right up to the Seaver tract and that only four additional miles of logging road need be built to reach this timber (R. 259). In any event, Siuslaw, which owned over 200,000,000 feet of timber in the area (R. 257), had a long-range program of buying timber for conversion at a later time. The contract of May 4, 1942, which contained a 20-year cutting period, and an additional five years if necessary for completion, was based on Siuslaw's program to cut a lot of other timber first (R. 221).

An extended discussion of this point is unnecessary, since plaintiff's witness Jones testified that at least the old growth timber on the tract (though equally inaccessible) was merchantable in 1942 (R. 156). On

cross-examination, he confirmed the fact that timber stands which are wholly inaccessible are frequently sold (R. 173).

Of course, the logic of the court's construction of the terms of the contract alone is most persuasive (R. 497):

"If no second-growth timber is merchantable, why in the world would the parties have inserted a statement in the contract that they were selling second-growth timber? This is not a case of two people who didn't know the business. On one side we had Mr. Davidson representing the company, and on the other side Mr. Warlick. I don't think that either of them, particularly Mr. Davidson, would have put in a useless phrase 'merchantable second-growth' if there wasn't any merchantable second-growth."

In any event, in view of the court's construction of the terms of the agreement alone as manifesting the intent of the parties that the second growth fir and hemlock was merchantable on May 4, 1942, it is clear that the admission of extrinsic evidence as to intent could not be deemed reversible error. Even if the evidence to which plaintiff objects be disregarded, there is ample support for the findings made by the trial court. On appeal, it will be presumed that the trial judge considered only competent evidence (*Wells v. J. C. Penney Company*, 250 F.(2d) 221, 235 (CA 9)).

III

The trial court's findings that neither defendant nor Siuslaw ever relinquished or abandoned its rights to the fir and hemlock timber are also supported by credible oral testimony.

Plaintiff's alternative theory of recovery for timber removed from the tract subsequent to January 1, 1953, rests upon the proposition that defendant and Siuslaw had abandoned this timber and had released all interest therein.

In support of this position, plaintiff relies upon the fact that on the first cutting only 1,031,000 feet of second growth fir timber was cut, that 3,125,000 feet was removed after January 1, 1953, and that this logging was done subsequent to the filing of timber removal affidavits with the tax assessor of Lane County.

Findings of Fact XVIII and XXV (R. 58, 61-62) completely refute plaintiff's position. They are clear and comprehensive and are based primarily on the testimony of Frank McPherson (R. 378-383, 387-390). In his opinion, Judge Solomon stated that he was "impressed" with McPherson's testimony. The court thought "... he was a particularly good witness" (R. 495).

At the trial and before this Court, plaintiff contends that under the case of *Hughes v. Heppner Lumber Co.*, 205 Or. 11, 283 P.(2d) 142, 286 P.(2d) 126, the filing of the timber removal affidavits constituted abandonment as a matter of law. In its opinion, the trial court

distinguished the *Heppner* case on its facts from the case at bar (R. 494-496). The difference in status and authority between McPherson and the corporate officers of Heppner Lumber Company; the continued logging here as contrasted with Heppner's failure to make any claim for three years; the continued payment of taxes by defendant as distinguished from the termination of tax payments by Heppner; and, particularly, the acceptance of McPherson's testimony as contrasted with the rejection of the innocent explanations of the Heppner officers by the Oregon Supreme Court, were all factors which persuaded the trial court that the *Heppner* case was not in point.

Judge Solomon stated that he did not understand *Hughes v. Heppner Lumber Company* "to require a finding of abandonment, even where a false affidavit has been filed in the face of clear and convincing evidence to the contrary" (R. 496). The court's view of the *Heppner* case is confirmed by Judge Brand's statement in *Doherty v. Harris Pine Mills, Inc.*, 211 Or. 378, 315 P.(2d) 566, as to the actual holding of the court in the *Heppner* case, where there was no specific time limitation in the contracts for the removal of timber (pp. 423-424):

— "Finally, we come to *Hughes v. Heppner Lumber Co.*, supra, 205 Or 11, 283 P2d 142, 286 P2d 126. In February 1939 plaintiffs deeded to the predecessor of defendant all pine and merchantable fir timber on 116 acres of land here involved. Two days later the grantee of the timber conveyed to the plaintiffs 692 acres of the land in litigation, reserving all of the pine and merchantable fir timber thereon 'with the right to log the same at its

convenience.' The defendant succeeded to the rights in the reserved timber. This court stated the issue thus: 'did defendant remove all the merchantable timber as contemplated by the parties in 1939, during the years 1939 to 1948, inclusive?' The court continued:

" 'The parties agree on the issues, at least in respect to this question. Defendant claims and plaintiffs disclaim that the timber now contended for was merchantable timber in 1939. Defendant asserts therefore that they have a reasonable time to remove it. If the timber, however, was not merchantable at that time it follows that the "reasonable time for removal" doctrine would have no applicability.

" 'A grant of merchantable timber is a grant only of the merchantable timber on the land at the date of the contract. *Rayburn et ux v. Crawford et ux.*, 187 Or. 386, 398, 211 P2d 483.' 205 Or at 14.

"The defendant after 1948 ceased to log and made no claim to any remaining timber until 1951 when the price had 'soared some 400 per cent.' The majority of the court held that in 1951 a reasonable time for removal of the reserved timber had expired. Two judges dissented on this issue but they agreed with the majority on the time as of which merchantability and size are to be determined."

In the other Oregon case relied upon by plaintiff at the trial (R. 379), *Kergil v. Central Oregon Fir Supply Company*, 213 Or. 186, 323 P.(2d) 947, the only question was whether oral evidence denying the validity of a written lease was admissible where the clear purpose of the lease was to defraud and mislead the government. The court refused to allow the deceiver to profit by its fraud. This is clearly distinguishable from the case at bar where the district court upon an appraisal of oral testimony

found that McPherson “. . . made and filed the affidavits in good faith without intending to mislead or deceive the County Assessor, and the record does not establish that the Assessor was in fact misled or deceived” (R. 62).

Under these circumstances, this Court should follow its well-settled rule that the considered view of the local district judge as to the proper interpretation of state appellate court decisions will be accepted, in the absence of clear error (*People of the State of California v. United States*, 235 F.(2d) 647, 654 (CA 9); *Citrigno v. Williams*, 255 F.(2d) 675 (CA 9); *Bower v. Bower*, 255 F.(2d) 618 (CA 9)).

IV

The trial court correctly concluded that plaintiff had consented to the removal of all the fir and hemlock timber.

Plaintiff claims that the trial court erred in entering Conclusion of Law IV to the effect that he consented to the removal by defendant and Siuslaw of all the fir and hemlock for which he claimed damages herein (R. 64), and it is urged that “there was no evidence to support a conclusion that appellant knowingly consented to anything” (App. br. p. 16).

There was ample evidence from plaintiff’s own testimony that he was thoroughly familiar at all times with the logging operations being conducted on the property (R. 106-107). He admitted that from the time he acquired an interest in the property he had no objection to

the taking of the timber (R. 136). No objection was ever voiced until the spring of 1956 after all the timber in question had been cut and removed (R. 54). Under the Oregon law, as stated in *Schiffman v. Hickey*, 101 Or. 596, 200 Pac. 1035, consent is a complete defense to a trespass action; it may be shown by conduct as well as by words; and knowledge and failure to object constitute the elements of consent.

Plaintiff's argument that he did not learn of his alleged cause of action for timber trespass until the spring of 1956 amounts only to an assertion that prior to that time he was acting under a mistake of law. However, in this case it is wholly immaterial that his consent was based, as contended by plaintiff, upon a mistaken interpretation of the terms of the May 4, 1942, agreement.

Under the general rule of the *Restatement of Torts*, Section 892, Comment b, and *Prosser on Torts* (2d Ed.), p. 85, consent resulting from a mistake of law protects an actor from liability unless he knows or should have known that the manifestation is the result of a mistake by the other party, or unless the other's mistake has been induced by the actor's misleading conduct. In this case, there can be no claim that defendant knew or should have known that plaintiff was acting under a mistake of law, or that defendant was guilty of any misleading conduct.

V

**Under no circumstances could defendant
be liable for treble damages imposed by
ORS 105.810.**

While the question appears quite academic, plaintiff argues that treble damages for the cutting and removal of second growth fir and hemlock timber should have been awarded because “. . . it is clear from defendant's conduct that its removal of the second growth timber was wilful and intentional, and there is no evidence that it was casual or involuntary or that it had probable cause to believe that it owned the timber” (App. br. p. 47).

Again, plaintiff's argument runs directly contrary to the clear and comprehensive findings of fact, particularly Finding of Fact XXVII which states (R. 62-63):

“Siuslaw and defendant, in all of their respective logging operations upon the Seaver tract, cut and removed the fir and hemlock timber therefrom in a *bona fide* belief that they were the owners of such timber and were entitled to cut and remove the same from said tract under the terms of the contract of May 4, 1942.”

There is very substantial evidence in the record to support this finding, but it will be sufficient only to mention a few points: (1) the stipulated Finding of Fact XI to the effect that plaintiff made no objection to the quantity, quality, size or species of timber cut and removed until the spring of 1956 (R. 54); (2) Finding of Fact XXII (to which plaintiff has made no objection) to the effect that during the period of cutting and re-

moval plaintiff requested and received reimbursement from defendant or Siuslaw of fire patrol assessments on that portion of the real property allocable to the timber (R. 59-60); (3) McPherson's testimony that when the logging was being done, he in good faith believed that all of the timber being taken off the tract belonged to defendant (R. 387).

Nevertheless, plaintiff argues that "Appellee's belief, bona fide or otherwise, has no effect upon the imposition of treble damages under the Oregon statutes" (App. br. p. 14). This view of the Oregon law is contrary to the trial court's ruling with respect to the demand for treble damages on account of the five cedar trees cut. In awarding double damages of \$80.00, Judge Solomon stated that he could not attribute ". . . malice and evil intent to the company . . ." (R. 500).

This necessary element of malice or evil intent in order to impose treble damages is thoroughly discussed by the Oregon Supreme Court in *Kinzua Lumber Co. v. Daggett*, 203 Or. 585, 281 P.(2d) 221, where the double damage statute (ORS 105.815) was distinguished from the treble damage section (ORS 105.810) as follows (pp. 590-591, 593):

"The section is concerned solely with the taking, and not with the state of mind of the offender. If the taking was attended with a malign purpose, the wrongdoer is subject to ORS 105.810 which renders material the intent of the wrongdoer."

* * * * *

"Since ORS 105.810 makes provision for the recovery of treble damages from anyone who 'wilfully injures' a tree, and, going on, prescribes the

manner in which the evil purpose may be established, we cannot, by the process of judicial interpretation, infuse into ORS 105.815 the word 'wilful'. Accordingly, ORS 105.815 deals with trespassers who have no evil intent."

As specifically noted in *McHargue v. Calchina*, 78 Or. 326, 330, 153 Pac. 99, the "harsh rule" of *Loewenberg v. Rosenthal*, 18 Or. 178, 23 Pac. 601, relied upon by plaintiff (App. br. pp. 48-49), was modified by a later decision. The *McHargue* case was followed in *Siuslaw Timber Co. v. Russell*, 91 Or. 6, 178 Pac. 214, where the Oregon rule was stated (p. 10):

"Whatever may be the conclusion in other jurisdictions, it is settled in this state that the burden is upon the plaintiff to establish the trespass, and that it was committed by the defendant with knowledge that he was trespassing, before there can be a recovery of the penalty of treble damages."

The other case cited by plaintiff on this point is *Longview Fibre Co. v. Johnston*, 193 Or. 385, 238 P.(2d) 722, where treble damages were demanded. The trial court merely awarded double damages, and the Supreme Court of Oregon affirmed this judgment (see *Kinzua Lumber Co. v. Daggett*, 203 Or. 585, 589, 281 P.(2d) 221).

CONCLUSION

The findings of fact are based upon stipulated facts and oral testimony accepted as credible by the trial judge. The court below carefully and correctly evaluated and applied the controlling Oregon law.

The judgment appealed from should be affirmed.

Respectfully submitted,

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ROBERT H. HUNTINGTON,

Attorneys for Appellee,
United States Plywood Corporation.

No. 16357

In the

United States Court of Appeals for the Ninth Circuit

JOHN N. SEAVER, JR., *Appellant*

vs.

UNITED STATES PLYWOOD
CORPORATION, *Appellee*,

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, District Judge

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AUG - 5 1959

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No. 16357

In the

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JOHN N. SEAVER, JR., *Appellant*,

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UNITED STATES PLYWOOD
CORPORATION, *Appellee*.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, District Judge.

INTRODUCTION

Appellee's basic argument throughout its Brief proceeds on the assumption that this court is restricted by Rule 52a of the Federal Rules of Civil Procedure in reviewing the trial court's findings of fact, as appellee asserts that there is evidence to support the disputed findings.

Appellant readily concedes that if there is substantial evidence to support the trial court's findings, this court must affirm. However, we have demonstrated, and appellee has shown nothing to the contrary, that there was *no* evidence to support the findings in this case which were adverse to appellant.

PROPOSITION I

There is no evidence that the second growth timber on appellant's property was merchantable on May 4, 1942.

AUTHORITIES

Dahl v. Crain, 193 Or 207, 237 P2d 939

Doherty et ux v. Harris Pine Mills, Inc., 211 Or 378, 315 P2d 566

ARGUMENT

a) *The law.* Appellee apparently agrees with appellant's demonstration that under the law of Oregon "merchantable timber" means "timber which has a commercial value in the locality." However, it then argues that the term is ambiguous so as to permit parol evidence to vary this well understood meaning.

A casual reading of the Oregon authorities, including the very cases cited and quoted from by appellee (Br 8-12), shows that the definition is not ambiguous, but it is a question of fact in any case as to whether spe-

cific trees in issue are "merchantable timber," i.e., whether they have a commercial value. The Supreme Court clearly expressed this in the case of *Dahl v. Crain*, 193 Or 207, 237 P2d 939, where it said:

" * * * What may be "merchantable timber" at one time or place may not be deemed such at another time or place. In determining what is covered by the term at a particular time and in a particular locality many factors are considered. Size and quality are of prime importance. Location, accessibility, demand, and market conditions are regarded. We do not assume to enumerate all the elements involved in the term. * * * "

Because of this rule of law, appellant admits it is a question of fact as to whether the second growth trees on appellant's property were merchantable, i.e., had a commercial value, on May 4, 1942.

Basically, this is no different from any case where quality or condition of property is in issue. "U.S. Grade AA" eggs is clear and unambiguous and means eggs which meet the standards of the applicable government regulations. The parties to a contract concerning such eggs would certainly not be permitted to claim that the words mean Grade B eggs or any other eggs except Grade AA. However, it would be a question of fact as to whether a given case of eggs was Grade AA, and that would be a subject for expert testimony by persons

who knew the difference between such eggs and other kinds.

Likewise, in this case, evidence was necessary and admissible to show whether the second growth timber on appellant's property was "merchantable timber" on May 4, 1942. This testimony would be directed to the quality of the timber and not the meaning of the words, "merchantable timber".

As pointed out in Appellant's Brief (page 56), the Oregon Supreme Court has said, in *Doherty et ux v. Harris Pine Mills, Inc.*, 211 Or 378, 315 P2d 566:

"Considered alone this paragraph [merchantable timber] would appear to be clear and unambiguous * * *"

The authorities refute appellee's argument that parol evidence of the alleged "actual intent" of the original parties to the contract was admissible to show these words to mean something else. As a matter of law, it was not. See Appellant's Brief, page 55 et seq.

This is apparently tacitly conceded by appellee, because in its Brief (page 21), it makes the weak contention that even though it might be error to have admitted the testimony to the effect that Warlick thought "merchantable timber" meant "all timber," this would not be necessarily reversible error.

Therefore, the basic issue between appellant and appellee remains as to whether there was any evidence that *this* timber was merchantable. *There was no such evidence.*

b) *The evidence of merchantability.* Appellee argues (Br 17-21) that because there was evidence that second growth timber, as such, was used in Lane County in 1942, this constitutes substantial evidence that the second growth timber on appellant's property was merchantable on that date. This does not constitute a scintilla of evidence to that effect. As pointed out above, the Supreme Court of Oregon said, in the case of *Dahl v. Crain*, 193 Or 207, 237 P2d 939

“ * * * What may be “merchantable timber” at one time or place may not be deemed such at another time or place. In determining what is covered by the term at a particular time and in a particular locality many factors are considered. Size and quality are of prime importance. Location, accessibility, demand, and market conditions are regarded. We do not assume to enumerate all the elements involved in the term. * * * ”

As demonstrated in Appellant's Brief (pages 31-40), all of the competent evidence on the basic fact in issue in this case, i.e., whether the second growth timber on appellant's property was merchantable on May 4, 1942,

is that the second growth was *not* merchantable. Since there is no evidence that it was, the trial court must be reversed. In so reversing the trial court, this court will be giving full effect to Rule 52a, since a judgment cannot be supported by findings which are "clearly erroneous."

c) *Conduct of the parties.* Appellee argues (Br 15-17) that the conduct of the parties shows that everyone knew that "merchantable timber" was supposed to mean "all timber." As a matter of fact, the actual conduct of the parties, and particularly the conduct of appellee and its predecessor, conclusively shows that appellee and its predecessor knew that they had not acquired title to the second growth timber. This fact appears from documentary evidence and is not in any way dependent upon the testimony of witnesses or the trial court's appraisal of the witnesses. These facts of "practical construction of the contract," to use appellee's words, are:

1. *The Hooker cruise* (R 274). Hooker made this cruise at the request of appellee's predecessor and reported there were "about 5,000,000 feet of timber" (R 275). This would have been a fairly accurate cruise of the old growth, but would have been about 100% off if it had included the second growth. The only possible conclusion from this fact is that appellee's prede-

cessor was not buying the second growth and asked Hooker to report to it how much old growth was on the property.

2. *The depletion records.* Appellee's predecessor set up its depletion records based on the Hooker cruise (Exs. 18A-18B). Since the Hooker cruise was fairly accurate as to the old growth, this shows that appellee's predecessor was operating on the assumption that it only owned the old growth.

3. *The removal affidavits.* Appellee's predecessor, after it had cut nearly all of the old growth, admittedly filed the removal affidavits. As pointed out in Appellant's Brief (page 41), it advised the county assessor in January of 1951:

"* * * all timber has been removed from the reported lands * * *."

The testimony of no witness nor the trial judge's opinion of him can change these basic facts, and the only conclusion to be reached is that appellee knew it had removed all the timber it owned when it filed the affidavits.

4. *The manner of logging and price of timber.* Before 1953, appellee cut and removed nearly all of the old growth and very little of the second growth. See

Appellant's Brief (pages 38-39). This again demonstrates that it knew what it was doing and only went back and cut the second growth after a fantastic rise in its value of over 400% from 1950.

(The evidence is that good second growth was worth \$1.25 per thousand in 1940, if it was close to a public road (R 332).)

Based upon all of this evidence, it is clear that the "practical construction" appellee urges is against its position and completely in favor of appellant. The axiom, "Actions speak louder than words," is particularly apt to apply to these facts. Appellee and its predecessor knew at all times they did not own the second growth, and their conduct conclusively demonstrates this belief.

PROPOSITION II

Appellant did not consent to the removal of the second growth after 1952.

AUTHORITIES

Schiffman v. Hickey, et ux, 101 Or 596, 200 Pac 1035

ARGUMENT

We will not repeat appellant's argument appearing in his Brief (pages 53-55) here.

However, the facts are that appellant did not know that appellee and its predecessor had wrongfully cut his timber until after it was cut and he consulted his attorney. In support of its contention of consent, appellee cites the case of *Schiffman v. Hickey, et ux*, 101 Or 596, 200 Pac 1035. In this case it appeared as an undisputed fact that the plaintiff had had a survey of the property made, and after he knew the defendant was pasturing cattle on his land, he continued to permit defendant to do so. The court, of course, held that consent was a defense. However, the defendant in that case had complete knowledge of his rights. This is not true in the instant case.

Further, as demonstrated above, appellee did know its rights, and it knew it did not own the second growth timber. There is no evidence that appellee relied in any way upon any alleged consent of appellant, and it cut the timber in complete disregard to appellant's rights.

PROPOSITION III

Appellee is liable for treble damages.

ARGUMENT

Appellee's only contention on this point is that it claims to have acted in good faith and therefore, it says, only double damages may be recovered. We refer the

court to the argument under Proposition II above, where it is conclusively shown that appellee knew what it was doing all the time and knew it did not own the second growth timber. Its logging superintendent, Frank W. McPherson (R 412), testified that in spite of the language of the contract appellee and its predecessor treated this land exactly as if it owned the fee.

The only conclusion that could be made on all of the evidence is that the timber was willfully and intentionally cut and, therefore, appellant is entitled to treble damages. See Appellant's Brief, 46-53.

CONCLUSION

Appellee's Brief has not pointed out any evidence in the record of this case to support the disputed findings. All of the evidence is to the contrary. Consequently, the findings are "clearly erroneous," and a judgment based upon them cannot be permitted to stand. The trial court must be reversed and directed to enter a judgment in favor of appellant for three times the value of the timber removed after January 1, 1953.

Respectfully submitted,

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No. 16358 ✓

United States
Court of Appeals
for the Ninth Circuit

HARRY H. MEISNER,

Appellant,

vs.

RELIANCE STEEL & ALUMINUM CO., a Corporation and SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, Executor of the Estate of Thomas J. Neilan, Deceased,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED
MAR 23 1959
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court for the Southern
District of California, Central Division

Civil Action No. 525-58—WM

HARRY H. MEISNER,

Plaintiff,

vs.

RELIANCE STEEL & ALUMINUM CO., a California Corporation, and SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a National Banking Association, Executor of the Estate of Thomas J. Neilan, Deceased,

Defendants.

COMPLAINT

Count I.

The plaintiff says:

1. That the plaintiff, Harry H. Meisner, is a citizen of the State of Michigan, residing in the City of Detroit, in the State of Michigan; that the defendant, Reliance Steel & Aluminum Co., is a corporation incorporated under the laws of the State of California with offices and principal place of business in the City of Los Angeles in said district and a citizen of the State of California, and that the defendant, Security-First National Bank of Los Angeles is a National banking association with offices and principal place of business at Los Angeles in said state and district and a citizen of the State of California; that jurisdiction of this

action is founded on diversity of citizenship and that the matter in controversy exceeds the sum of three thousand dollars, exclusive of interest and costs. [2*]

2. That the defendant, Security-First National Bank of Los Angeles, is the duly qualified and acting Executor of the estate of Thomas J. Neilan, deceased, under the will of said deceased duly admitted to probate by the Superior Court of the State of California, in and for the County of Los Angeles on December 13, 1957.

3. That during his lifetime, said Thomas J. Neilan was the president and controlling stockholder of Reliance Steel and Aluminum Co. and in charge of its activities.

4. That at various times between April, 1957, and August 2, 1957, the defendant, Reliance Steel and Aluminum Co., and said Thomas J. Neilan, on behalf of said corporation and for and on behalf of himself, as principal stockholder and party of interest in said corporation, acting sometimes in person and sometimes through various agents, employed plaintiff and one, Jack Moore, by various instruments in writing, as their agents and attorneys to find a purchaser ready, willing and able to purchase or acquire the assets of said corporation or the capital stock thereof on terms mutually agreeable, and agreed to pay the plaintiff and Jack Moore 5% of the first \$1,000,000 and 2½% of the remainder of the net purchase price on such sale.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

5. That subsequently it was agreed between the parties that one-half of said commission should be paid directly to plaintiff and the other half to Jack Moore.

6. That subsequent thereto, Harry H. Meisner fully performed said agreement by finding a purchaser ready, willing and able to purchase such interests, namely, Myron Hokin, individually and as agent for H. W. & G. Corporation, on terms mutually acceptable to the parties for a total price of approximately \$3,750,000. That a written agreement was entered into covering [3] such sale; and the purchaser made a deposit of \$250,000 on the purchase price and was ready, willing and able to perform such purchase according to the terms of the written purchase agreement of October 2, 1957, and the various riders and amendments thereto. That all conditions have been completed precedent to defendants' liability for such commission except the actual closing of such sale, which condition has been waived by defendants by their refusal to complete the sale although the other party has been ready, willing and able to perform, and that defendants are estopped to require performance or compliance with such condition.

7. That defendants thereupon became indebted to plaintiff for a commission in the amount of approximately \$60,000. That the defendants have refused to pay said commission or any part thereof although payment has frequently been requested.

Wherefore, plaintiff claims judgment in the sum of \$75,000.00.

Count II.

1-7. Plaintiff herein repeats each and every allegation of paragraphs 1 to 7, inclusive, of Count I.

8. That being so indebted to plaintiff, Harry H. Meisner, for the commission aforesaid, the said defendants on a day certain, namely, November 12, 1957, did assume and agree to pay plaintiff one-half thereof or the sum of \$30,000 if and when such sale and purchase agreement should be executed.

9. That although said agreement has been executed and plaintiff has fully performed all conditions precedent to defendants' liability aforesaid, defendants have refused to pay [4] said sums or any part thereof although payment has often been requested.

Wherefore, plaintiff claims judgment in the sum of \$75,000.

Dated May 29, 1958.

/s/ HARRY H. MEISNER,
Plaintiff, Appearing in
Propria Persona.

Complaint amended July 2, 1958.

[Endorsed]: Filed June 2, 1958. [5]

[Title of District Court and Cause.]

AMENDED COMPLAINT

Count I.

The plaintiff says:

1. That the plaintiff, Harry H. Meisner, is a citizen of the State of Michigan residing in the City of Detroit, in the State of Michigan; that the defendant, Reliance Steel & Aluminum Co., is a corporation incorporated under the laws of the State of California with offices and principal place of business in the City of Los Angeles in said district and a citizen of the State of California, and that the defendant, Security-First National Bank of Los Angeles is a National banking association with offices and principal place of business at Los Angeles in said state and district and a citizen of the State of California; that jurisdiction of this action is founded on diversity of citizenship and that the matter in controversy exceeds the sum of three thousand dollars, exclusive of interest and costs. [7]

2. That the defendant, Security-First National Bank of Los Angeles, is the duly qualified and acting Executor of the estate of Thomas J. Neilan, deceased, under the will of said deceased duly admitted to probate by the Superior Court of the State of California, in and for the County of Los Angeles on December 13, 1957.

3. That during his lifetime, said Thomas J.

Neilan was the president and controlling stockholder of Reliance Steel and Aluminum Co. and in charge of its activities.

4. That at various times between April, 1957, and August 2, 1957, the defendant, Reliance Steel and Aluminum Co., and said Thomas J. Neilan, on behalf of said corporation and for and on behalf of himself, as principal stockholder and party of interest in said corporation, acting sometimes in person and sometimes through various agents, employed plaintiff and one, Jack Moore, by various instruments in writing, as their agents and attorneys to find a purchaser ready, willing and able to purchase or acquire the assets of said corporation or the capital stock thereof on terms mutually agreeable, and agreed to pay the plaintiff and Jack Moore 5% of the first \$1,000,000 and 2½% of the remainder of the net purchase price on such sale.

5. That subsequently it was agreed between the parties that one-half of said commission should be paid directly to plaintiff and the other half to Jack Moore.

6. That subsequent thereto, Harry H. Meisner fully performed said agreement by finding a purchaser ready, willing and able to purchase such interests, namely, Myron Hokin, individually and as agent for H. W. & G. Corporation, on terms mutually acceptable to the parties for a total price of approximately \$3,750,000. That a written agreement was entered into covering [8] such sale; and

the purchaser made a deposit of \$250,000 on the purchase price and was ready, willing and able to perform such purchase according to the terms of the written purchase agreement of October 2, 1957, and the various riders and amendments thereto. That all conditions have been completed precedent to defendants' liability for such commission except the actual closing of such sale, which condition has been waived by defendants by their refusal to complete the sale although the other party has been ready, willing and able to perform, and that defendants are estopped to require performance or compliance with such condition.

7. That defendants thereupon became indebted to plaintiff for a commission in the amount of approximately \$60,000. That the defendants have refused to pay said commission or any part thereof although payment has frequently been requested.

8. That on or about June 10, 1958, plaintiff served a copy of his claim upon the defendant executor by registered mail with postage fully paid under Detroit postal registry No. 347,257 and has received therefor United States Postal Receipt dated June 11, 1958, signed for and in the name of defendant, Security-First National Bank of Los Angeles, by a name which appears to be Tom V. Doud or Tom V. David. That said service was made upon such executor in conformance with California Probate Code Sec. 700, et seq., and particularly Sec. 711 within the time limited by said section although the same is believed to be inap-

plicable to actions in the United States District Courts.

Wherefore, plaintiff claims judgment in the sum of \$75,000.00.

Count II.

1-7. Plaintiff herein repeats each and every allegation of paragraphs 1 to 7, inclusive of Count I.

8. That being so indebted to plaintiff, Harry H. Meisner, for the commission aforesaid and in consideration thereof, the said defendants on a day certain, namely, November 12, 1957, did assume and agree to pay plaintiff one-half thereof or the sum of \$30,000 if and when such sale and purchase agreement should be executed.

9. That although said agreement has been executed and plaintiff has fully performed all conditions precedent to defendants' liability aforesaid, defendants have refused to pay said sums or any part thereof although payment has often been requested.

10. Plaintiff herein repeats the allegations of paragraph 8 of Count I.

Wherefore, plaintiff claims judgment in the sum of \$75,000.

Dated June 17th, 1958.

/s/ HARRY H. MEISNER,
Plaintiff, Appearing in
Propria Persona.

[Endorsed]: Filed July 2, 1958. [10]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT RELIANCE
STEEL & ALUMINUM CO. TO PLAINTIFF'S AMENDED COMPLAINT

First Defense

1. Defendant admits the allegations contained in paragraphs 1 and 2 of the first and second counts of the amended complaint; denies the allegations contained in paragraph 3 of the first and second counts of the amended complaint; alleges that during the portion of the year 1957 ending with his death, and for some years prior thereto, Thomas J. Neilan was the President and one of the Directors of defendant and indirectly controlled a majority of the shares of defendant's issued and outstanding capital stock; denies the allegations contained in paragraphs 4, 5, 6 and 7 of the first [11] and second counts of the amended complaint except the implied allegation contained in paragraph 7 of the first and second counts of the amended complaint that defendant has refused to pay any commission to plaintiff although payment has been requested of defendant; alleges it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the first count and paragraph 10 of the second count of the amended complaint; denies the allegations contained in paragraphs 8 and 9 of the second count of the amended complaint except the

implied allegation contained in said paragraph 9 that defendant has refused to pay \$30,000 or any part thereof to plaintiff although payment has been requested of defendant.

Second Defense

2. The amended complaint fails to state a claim against the defendant upon which relief can be granted.

Third Defense

3. Plaintiff has failed to join Jack Moore who is an indispensable party to this action.

Fourth Defense

4. Defendant alleges on information and belief that if the sale alleged in the amended complaint was agreed upon, said alleged sale was negotiated in part by plaintiff in the State of California; further alleges on information and belief that plaintiff was not then licensed so to do either by the Real Estate Commissioner or the Commissioner of Corporations of said State; further alleges on information and belief that at no time mentioned in the amended complaint was plaintiff licensed to practice law in said State. [12]

Fifth Defense

5. That if defendant is indebted to plaintiff on account of the purported transactions set forth in

the amended complaint, defendant alleges on information and belief that it is indebted to plaintiff and Jack Moore jointly; alleges that said Jack Moore is alive; further alleges on information and belief that said Jack Moore is a citizen of the State of Arizona and can be made a party without depriving the court of jurisdiction of this action; further alleges that said Jack Moore has not been made a party.

Sixth Defense

6. If a contract were made as alleged in the amended complaint by and between Thomas J. Neilan, deceased, and plaintiff, defendant alleges that plaintiff failed to perform on his part for the reasons that Myron Hokin, whether acting individually or as agent for H. W. & G. Corporation, did not agree to purchase, and plaintiff did not find a purchaser ready, willing or able to purchase, the assets or the shares of capital stock of defendant on terms acceptable to defendant and said deceased, or either of them.

Seventh Defense

7. If a contract were made as alleged in the amended complaint by and between Thomas J. Neilan, deceased, and plaintiff, defendant alleges on information and belief that the contract was made in the State of California, is not evidenced by a writing subscribed by said deceased, defendant or the agent of either of them, and was not to

be performed by its terms within a year from the time of its making.

Wherefore, defendant prays judgment that plaintiff take [13] nothing by his amended complaint and for costs of defendant.

LAWLER, FELIX & HALL,
WILLIAM T. COFFIN,
ROBERT HENIGSON,

By /s/ WILLIAM T. COFFIN,
Attorneys for Defendant Reliance Steel & Aluminum Co.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 7, 1958. [14]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT SECURITY-
FIRST NATIONAL BANK, AS EXECU-
TOR, TO PLAINTIFF'S AMENDED COM-
PLAINT

First Defense

1. Defendant admits the allegations contained in paragraphs 1 and 2 of the first and second counts of the amended complaint; alleges it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained

in paragraphs 3, 4 and 5 of the first and second counts of the amended complaint; denies the allegations contained in paragraphs 6 and 7 of the first and second counts of the amended complaint except the implied allegation contained in paragraph 7 of the first and second counts of the amended complaint that defendant Reliance Steel & [16] Aluminum Co. has refused to pay any commission to plaintiff although payment has been requested of said Reliance Steel & Aluminum Co.; denies the allegations contained in paragraph 8 of the first count and paragraph 10 of the second count of the amended complaint; alleges that defendant received by registered mail on June 11, 1958, a document purporting to be a verified claim of plaintiff against the estate of Thomas J. Neilan, deceased, unto which was appended a copy of the original complaint on file herein; alleges it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the second count of the amended complaint; denies the allegations contained in paragraph 9 of the second count of the amended complaint except the implied allegation that defendant Reliance Steel & Aluminum Co. has refused to pay \$30,000 or any part thereof to plaintiff although payment has been requested of said Reliance Steel & Aluminum Co.

Second Defense

2. The amended complaint fails to state a claim against defendant upon which relief can be granted.

Third Defense

3. Plaintiff has failed to join Jack Moore who is an indispensable party to this action.

Fourth Defense

4. Plaintiff's claim against the estate of Thomas J. Neilan, deceased, upon which this action is founded, was neither presented to defendant nor filed with the clerk of the court in which said deceased's probate proceedings are pending prior to the commencement of this action. [17]

Fifth Defense

5. Defendant alleges on information and belief that if the sale alleged in the amended complaint was agreed upon, said alleged sale was negotiated in part by plaintiff in the State of California; further alleges on information and belief that plaintiff was not then licensed either by the Real Estate Commissioner or the Commissioner of Corporations of said State so to do; further alleges on information and belief that at no time mentioned in the amended complaint was plaintiff licensed to practice law in said State.

Sixth Defense

6. If defendant is indebted to plaintiff on account of the purported transactions set forth in the amended complaint, defendant alleges on information and belief that it is indebted to plaintiff

and Jack Moore jointly; alleges that said Jack Moore is alive; further alleges on information and belief that said Jack Moore is a citizen of the State of Arizona and can be made a party without depriving the court of jurisdiction of this action; further alleges that said Jack Moore has not been made a party.

Seventh Defense

7. If a contract were made as alleged in the amended complaint by and between Thomas J. Neilan, deceased, and plaintiff, defendant alleges on information and belief that plaintiff failed to perform on his part for the reasons that Myron Hokin, whether acting individually or as agent for H. W. & G. Corporation, did not agree to purchase, and plaintiff did not find a purchaser ready, willing or able to purchase, the assets or the shares of capital stock of Reliance Steel & Aluminum Co. on terms acceptable to said Reliance Steel & Aluminum Co. and said deceased, or either of [18] them.

Eighth Defense

8. If a contract were made as alleged in the amended complaint by and between Thomas J. Neilan, deceased, and plaintiff, defendant alleges on information and belief that the contract was made in the State of California, is not evidenced by a writing subscribed by said deceased or his agent and was not to be performed by its terms within a year from the time of its making.

Wherefore, defendant prays judgment that plaintiff take nothing by his amended complaint and for costs of defendant.

LAWLER, FELIX & HALL,
WILLIAM T. COFFIN,
ROBERT HENIGSON,

By /s/ WILLIAM T. COFFIN,
Attorneys for Defendant Security-First National
Bank, as Executor of the Will of Thomas J.
Neilan, Deceased.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 7, 1958. [19]

[Title of District Court and Cause.]

INTERROGATORIES BY DEFENDANT RE-
LIANCE STEEL & ALUMINUM CO. TO
PLAINTIFF

To Harry H. Meisner, Plaintiff:

You are hereby notified to answer the following interrogatories under oath within fifteen days of the time service is made upon you, in accordance with Rule 33 of the Federal Rules of Civil Procedure: [21]

* * *

27. Identify by date and signatory or signatories all the "various instruments in writing" referred to in paragraph 4 of the first and second

counts of the complaint and state of which such instruments you have a copy or the original.

28. When was the agreement referred to in paragraph 5 of the first and second counts of the complaint made?

29. Name all the parties between whom such agreement was made.

30. Is such agreement evidenced by a writing?

* * *

35. Identify by date and signatories the written agreement first referred to in paragraph 6 of the first and second counts of the complaint. [24]

* * *

39. Is the written purchase agreement of October 2, 1957, referred to in paragraph 6 of the first and second counts of the complaint the same as the agreement first referred to therein?

* * *

43. Identify with particularity by date and signatories all the "various riders and amendments" to the written purchase agreement of October 2, 1957, referred to in paragraph 6 of the first and second counts of the complaint.

44. Identify those documents specified in your answer to interrogatory number 43 of which you have a copy or the original.

45. State the date upon which you contend you completed your performance and were entitled to a commission.

46. Did you come to California at any time after April, 1947, in connection with the employment referred to in paragraph 3 of the first and second counts of the complaint? [25]

47. If your answer to interrogatory number 46 is yes, give the dates that you were here in California in connection with said employment from April 1, 1957, to the date given in your answer to interrogatory number 45.

48. With whom was the deposit of \$250,000 referred to in paragraph 6 of the first and second counts of the complaint made?

49. When was such deposit made?

50. Who made such deposit?

51. Was the deposit accompanied by written instructions regarding the disposition of the funds?

52. If your answer to interrogatory number 51 is yes, identify the writing or writings by date and signatories and state of which such writings you have a copy or the original.

53. Are you now or have you ever been licensed to practice law in the State of California?

* * *

55. Are you now or have you ever been licensed by the Commissioner of Corporations of the State of California as a securities broker or agent?

* * *

57. Are you now or have you ever been licensed

by the Real Estate Commissioner of the State of California as a real estate broker or salesman?

* * *

59. Are you now or have you ever been licensed by the Real Estate Commissioner of the State of California as a business opportunity broker or salesman? [26]

* * *

65. When was the agreement first referred to in paragraph 6 of the first and second counts of the complaint executed? [27]

* * *

Dated this 2nd day of July, 1958.

Respectfully submitted,

LAWLER, FELIX & HALL,
WILLIAM T. COFFIN,
ROBERT HENIGSON,

By /s/ ROBERT HENIGSON,
Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 3, 1958. [28]

[Title of District Court and Cause.]

PLAINTIFF'S ANSWERS TO INTERROGA-
TORIES OF RELIANCE STEEL & ALU-
MINUM CO.

Harry H. Meisner, plaintiff aforesaid, answers said interrogatories by number as follows: [30]

* * *

27. Instruments in writing.

a. July 30, 1957, Letter, Gimbel to Meisner, on Reliance letterhead.

b. Oct. 7, 1957, Letter, Neilan to Meisner, on Reliance letterhead.

c. Nov. 12, 1957, Letter, Neilan to Meisner, on plain paper, but signed as President, Reliance Steel.

28. By letters, November 12, 1957, and November 18, 1957.

29. Parties, Thomas J. Neilan, Reliance Steel and Harry H. Meisner.

30. By the two letters from Neilan to Meisner and Meisner to Neilan listed in answer 28.

* * *

35. Agreement, September 30, 1957, as amended, signed by Myron Hokin and accepted subject to rider by Reliance Steel and Aluminum Company, by T. J. Neilan, its President and Chairman of the Board, and by Thomas J. Neilan, individually, as Principal Stockholder of Reliance Steel and Aluminum Company. The rider is stated to be ap-

proved October 2, 1957, and signed by Reliance Steel and Aluminum Company by Thomas J. Neilan and by Myron Hokin. [32]

* * *

39. Yes. The agreement is dated September 30, 1957, and the rider October 2, 1957.

* * *

43 and 44. Plaintiff is unable to do so, except to state that the instrument dated October 2, 1957, is itself a rider.

45. On or about October 2, 1957, when Myron Hokin signed the rider described in (35).

46 and 47. Yes. On or about August 11, 1957. On or about September 26, 1957, and possibly two other occasions about that time.

48. Security-First National Bank of Los Angeles.

49. On or about October 3, 1957.

50. The check was left by Mr. Meisner with Mr. Neilan and by him deposited with the Bank.

51 and 52. Yes, in letter from Myron Hokin to Paul D. Dodds, Senior Vice President of Security First National Bank dated on or about September 30, 1957.

53. No.

* * *

55. No.

* * *

57. No.

* * *

59. No.

* * *

65. Agreement, September 30, 1957; Rider, October 2, 1957. [33]

* * *

/s/ HARRY H. MEISNER.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 11, 1958. [34]

[Title of District Court and Cause.]

FIRST REQUEST FOR ADMISSIONS
UNDER RULE 36, F.R.C.P.

To Harry H. Meisner, Plaintiff:

Defendant Reliance Steel & Aluminum Co. hereby requests that, within 10 days after service of this request, you make the following admissions for the purpose of the above-named action only, and subject to all pertinent objections to admissibility which may be interposed at trial:

1. That the photostat, marked Exhibit "A," attached hereto and exhibited herewith is a true copy of a letter (hereinafter called "said letter") of

Myron Hokin dated September 30, 1957, to Mr. Paul D. Dodds, Senior Vice President, Security-First National Bank of Los [37] Angeles;

2. That the photostat, marked Exhibit "B," attached hereto and exhibited herewith, is a true copy of the enclosure (hereinafter called "said enclosure") identified in said Exhibit "A" as "proposal submitted to Reliance Steel & Aluminum Company and Thomas J. Neilan";

3. That said letter was executed on or about the date that it bears, viz., September 30, 1957, by said Myron Hokin;

4. That said letter and said enclosure, together with a cashier's check payable to the order of Security-First National Bank of Los Angeles in the sum of \$250,000, were delivered to the addressee on or about October 3, 1957;

5. That said \$250,000 check is the sum alleged in paragraph 6 of the first and second counts of plaintiff's amended complaint to be a deposit on the purchase price for the sale of certain assets of Reliance Steel & Aluminum Co. to Myron Hokin, individually and as agent for H. W. & G. Corporation;

6. That said letter constituted all the instructions to the addressee regarding the disposition of said \$250,000 check other than the demand made by said Myron Hokin on or about December 27, 1957, for its return;

7. That said enclosure, comprising four pages, is a true copy of the instrument alleged in paragraph 6 of the first and second counts of plaintiff's amended complaint to be the written agreement entered into between Myron Hokin, individually and as agent for H. W. & G. Corporation, and Reliance Steel & Aluminum Co. and Thomas J. Neilan;

8. That said enclosure is a copy of the only purported agreement upon which plaintiff relies in his contention that he found a purchaser ready, willing and able to purchase or acquire the assets or the capital stock of Reliance Steel & Aluminum Co. on terms [38] mutually agreeable to the prospective purchaser and to Reliance Steel & Aluminum Co. and Thomas J. Neilan.

Respectfully submitted,

LAWLER, FELIX & HALL,
WILLIAM T. COFFIN,
ROBERT HENIGSON,

By /s/ ROBERT HENIGSON,
Attorneys for Defendant Reliance Steel & Aluminum Co.

[Endorsed]: Filed August 5, 1958. [39]

[Title of District Court and Cause.]

PLAINTIFF'S ADMISSIONS IN RESPONSE
TO DEFENDANTS' FIRST REQUEST
FOR ADMISSIONS

To Lawler, Felix & Hall, etc.,
Attorneys for the Defendants:

Harry H. Meisner hereby makes the following
Admissions in response to Defendants' First Re-
quest for Admissions:

1, 2, 3, 4, and 5. He admits the matters con-
tained in Defendants' Requests numbers 1, 2, 3, 4
and 5.

6. He admits that said letter constituted all the
instructions to the addressee regarding the \$250,-
000 check except that he has no knowledge of the
alleged demand dated December 27, 1957, by Myron
Hokin for its return.

7 and 8. He admits the matters contained in
Defendants' Requests numbers 7 and 8.

/s/ HARRY H. MEISNER,
Plaintiff.

Affidavit of Service by Mail attached.

Noted and signed: Filed August 20, 1958. [48]

7. That said enclosure, comprising four pages, is a true copy of the instrument alleged in paragraph 6 of the first and second counts of plaintiff's amended complaint to be the written agreement entered into between Myron Hokin, individually and as agent for H. W. & G. Corporation, and Reliance Steel & Aluminum Co. and Thomas J. Neilan;

8. That said enclosure is a copy of the only purported agreement upon which plaintiff relies in his contention that he found a purchaser ready, willing and able to purchase or acquire the assets or the capital stock of Reliance Steel & Aluminum Co. on terms [38] mutually agreeable to the prospective purchaser and to Reliance Steel & Aluminum Co. and Thomas J. Neilan.

Respectfully submitted,

LAWLER, FELIX & HALL,
WILLIAM T. COFFIN,
ROBERT HENIGSON,

By /s/ ROBERT HENIGSON,
Attorneys for Defendant Reliance Steel & Aluminum Co.

[Endorsed]: Filed August 5, 1958. [39]

Exhibits "A" and "B" attached to the First request for Admissions are reproduced as similarly marked "A" and "B" to Motion for Summary Judgement and appears herein at pages 78-84;

[Title of District Court and Cause.]

PLAINTIFF'S ADMISSIONS IN RESPONSE
TO DEFENDANTS' FIRST REQUEST
FOR ADMISSIONS

To Lawler, Felix & Hall, etc.,
Attorneys for the Defendants:

Harry H. Meisner hereby makes the following
Admissions in response to Defendants' First Re-
quest for Admissions:

1, 2, 3, 4, and 5. He admits the matters con-
tained in Defendants' Requests numbers 1, 2, 3, 4
and 5.

6. He admits that said letter constituted all the
instructions to the addressee regarding the \$250,-
000 check except that he has no knowledge of the
alleged demand dated December 27, 1957, by Myron
Hokin for its return.

7 and 8. He admits the matters contained in
Defendants' Requests numbers 7 and 8.

/s/ HARRY H. MEISNER,
Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 20, 1958. [48]

[Title of District Court and Cause.]

SECOND REQUEST FOR ADMISSIONS
UNDER RULE 36, F.R.C.P.

To Harry H. Meisner, Plaintiff:

Defendant Reliance Steel & Aluminum Co. hereby requests that, within 10 days after service of this request, you make the following admissions for the purpose of the above-named action only, and subject to all pertinent objections to admissibility which may be interposed at trial:

1. Admit that Thomas J. Neilan died on November 17, 1957. [51]

* * *

4. Admit that Jack Moore represented to you by telephone July 21, 1957, that he had an agreement with Reliance Steel whereby he would receive a sales commission of 5% of the first \$1,000,000 plus 2½% of the balance of the sale price for the business of Reliance Steel if and when such a sale were consummated.

5. Admit that you reached an agreement with Jack Moore during the aforesaid July 21, 1957, telephone conversation between you and him whereby Moore promised to pay you one-half of the total sales commission he received on account of the sale of the business of Reliance Steel if you were responsible for the consummation of such sale.

6. Admit that the photostat, marked Exhibit "C," attached hereto and exhibited herewith is a true copy of a letter of Jack Moore dated July 21, 1957 (hereinafter called the "Moore July 21 letter"), to you.

7. Admit that the Moore July 21 letter was executed on or about the date that it bears by Jack Moore and that you thereafter received the same on or about July 25 in the ordinary course of the United States mail.

8. Admit that the photostat, marked Exhibit "D," attached hereto and exhibited herewith, is a true copy of a letter from you dated July 25, 1957 (hereinafter called the "Meisner July 25 letter"), to Jack Moore.

9. Admit that the Meisner July 25 letter was signed by you on or about the date that it bears and was thereupon deposited in [52] the United States mail in an envelope addressed to Jack Moore with postage fully prepaid.

10. Admit that the terms of your employment agreement made July 21, 1957, with Jack Moore are fully set forth in the Moore July 21 letter and the Meisner July 25 letter.

11. Admit that the employment agreement made July 21, 1957, between you and Jack Moore was the only employment agreement ever reached by you on or before November 12, 1957, in connection with the sale of the assets or the capital stock of Reliance Steel.

12. Admit that the photostat, marked Exhibit "E," attached hereto and exhibited herewith, is a true copy of the letter from William T. Gimbel dated July 30, 1957 (hereinafter called the "Gimbel July 30 letter"), to you.

13. Admit that the Gimbel July 30 letter was signed by William T. Gimbel on or about the date that it bears and that it was thereafter received by you in the ordinary course of the United States mail.

* * *

16. Admit that the photostat, marked Exhibit "G," attached hereto and exhibited herewith, is a true copy of a letter from Thomas J. Neilan dated October 7, 1957 (hereinafter called the "Neilan October 7 letter"), to you.

17. Admit that the Neilan October 7, 1957, letter was [53] received by you in the ordinary course of the United States mail on or about October 10, 1957.

18. Admit that the photostat, marked Exhibit "H," attached hereto and exhibited herewith, is a true copy of a letter from Thomas J. Neilan dated November 12, 1957 (hereinafter called the "Neilan November 12 letter").

19. Admit that the plain copy, marked Exhibit "J," attached hereto and exhibited herewith, is a true copy of the enclosure (hereinafter called the "Neilan November 12 letter enclosure"), identified

in the Neilan November 12 letter as "the enclosed letter."

20. Admit that the Neilan November 12 letter and the Neilan November 12 letter enclosure were received by you in the ordinary course of the United States mail on or about November 15, 1957.

21. Admit that the Gimbel July 30 letter, the Neilan October 7 letter and the Neilan November 12 letter are all the various instruments in writing upon which you rely as evidence of your alleged employment by Reliance Steel and Thomas J. Neilan, as set forth in your answer Number 27 to defendant Reliance Steel's first interrogatories to you.

22. Admit that you never executed the Neilan November 12 letter enclosure.

23. Admit that the photostat, marked Exhibit "K," attached hereto and exhibited herewith, is a true copy of a letter from you dated November 18, 1957 (hereinafter called the Meisner November 18 letter"), to Thomas J. Neilan.

24. Admit that the photostat, marked Exhibit "L," attached hereto and exhibited herewith, is a true copy of a letter enclosure dated November 18, 1957 (hereinafter called the "Meisner November 18 letter enclosure"), signed by you on or about the date that it bears, addressed to Thomas J. [54] Neilan.

25. Admit that you signed the Meisner November 18 letter and the Meisner November 18 letter

enclosure on or about the date they bear and promptly forwarded the same together by prepaid United States mail to the addressee.

26. Admit that the Meisner November 18 letter, the Meisner November 18 letter enclosure and the Neilan November 12 letter are all the writings which evidence the purported agreement you allege was made in paragraph 5 of the first and second counts of your amended complaint, agreeably with your answers to defendant Reliance Steel's first interrogatories to you numbered 28, 29 and 30.

* * *

30. Admit that no agreement relative to who constituted the key personnel referred to in the purported sale agreement was ever reached between Myron Hokin and Reliance Steel or Thomas J. Neilan.

31. Admit that no agreement relative to the form of the key personnel employment agreement, as contemplated by the purported sale agreement, was ever reached between Myron Hokin and [55] Reliance Steel or Thomas J. Neilan.

32. Admit that no draft of any proposed employment agreement was at any time submitted by Myron Hokin or his representatives to Reliance Steel or to any of its officers or employees. [57]

* * *

Respectfully submitted,

LAWLER, FELIX & HALL,
WILLIAM T. COFFIN,
ROBERT HENIGSON,

By /s/ ROBERT HENIGSON,
Attorneys for Defendant Reliance Steel & Alumi-
num Co.

[Endorsed]: Filed August 29, 1958. [58]

[Title of District Court and Cause.]

SECOND INTERROGATORIES BY DEFEND-
ANT RELIANCE STEEL & ALUMI-
NUM CO.

To Harry H. Meisner, Plaintiff:

You are hereby notified to answer the following interrogatories under oath within fifteen days of the time service is made upon you, in accordance with Rule 33 of the Federal Rules of Civil Procedure. [71]

* * *

4. State the substance of your July 11, 1957, telephone conversation with Jack Moore, separately identifying your statements and those of Mr. [72] Moore.

* * *

on 11 of this de-
is a denial,

enclosure on or about the date they bear and promptly forwarded the same together by prepaid United States mail to the addressee.

26. Admit that the Meisner November 18 letter, the Meisner November 18 letter enclosure and the Neilan November 12 letter are all the writings which evidence the purported agreement you allege was made in paragraph 5 of the first and second counts of your amended complaint, agreeably with your answers to defendant Reliance Steel's first interrogatories to you numbered 28, 29 and 30.

* * *

30. Admit that no agreement relative to who constituted the key personnel referred to in the purported sale agreement was ever reached between Myron Hokin and Reliance Steel or Thomas J. Neilan.

31. Admit that no agreement relative to the form of the key personnel employment agreement, as contemplated by the purported sale agreement, was ever reached between Myron Hokin and [55] Reliance Steel or Thomas J. Neilan.

32. Admit that no draft of any proposed employment agreement was at any time submitted by Myron Hokin or his representatives to Reliance

Exhibits "C", "D", "E", "F", "G", "H", "J", "L" attached to Second Request for Ad-

missions are reproduced as similarly marked Exhibits to Motion for Summary Judgement and appear herein at pages 85-94.

Respectfully submitted,

LAWLER, FELIX & HALL,
WILLIAM T. COFFIN,
ROBERT HENIGSON,

By /s/ ROBERT HENIGSON,
Attorneys for Defendant Reliance Steel & Alumi-
num Co.

[Endorsed]: Filed August 29, 1958. [58]

[Title of District Court and Cause.]

SECOND INTERROGATORIES BY DEFEND-
ANT RELIANCE STEEL & ALUMI-
NUM CO.

To Harry H. Meisner, Plaintiff:

You are hereby notified to answer the following interrogatories under oath within fifteen days of the time service is made upon you, in accordance with Rule 33 of the Federal Rules of Civil Procedure. [71]

* * *

4. State the substance of your July 11, 1957, telephone conversation with Jack Moore, separately identifying your statements and those of Mr. [72] Moore.

* * *

18. If your response to Number 11 of this defendant's second request for admission is a denial,

set forth the terms of each of the alleged employment agreements made by you before November 12, 1957, in connection with the sale of the assets or the capital stock of Reliance Steel, state when, with whom and in whose presence each such employment agreement was made and identify which of such alleged employment agreements, if any, are evidenced by a writing. [73]

22. If your response to number 21 of this defendant's second request for admissions is a denial, identify such other instruments in writing upon which you rely as evidence of your alleged employment by Reliance Steel and Thomas J. Neilan and explain the inconsistency between your said response and your answer number 27 to this defendant's first interrogatories to you. [74]

* * *

28. Describe in detail, listing by date, place and service performed, the efforts you expended in bringing "(Neilan) and Hokin to a mutual understanding" as set forth in the Meisner November 18 letter, being Exhibit "K" to this defendant's second request for admissions.

29. Itemize the expenses, including travel, hotel, telephone and entertainment expense, listing the same by date, amount, person paid and subject of the expense, that you incurred in bringing "(Neilan) and Hokin to a mutual understanding" as set forth in the Meisner November 18 letter, being Ex-

hibit "K" to this defendant's second request for admissions.

30. State for which of the expenses itemized in the answer to interrogatory number 29 you have invoices.

* * *

33. On what date or dates do you contend that Reliance Steel and Thomas J. Neilan, or either of them, refused to complete the purported sale?

34. When and by whom was demand made upon this defendant to complete the purported sale?

35. When and by whom was demand made upon Thomas J. Neilan, deceased, or upon the executor of said deceased's will to complete the purported sale? [75]

* * *

Respectfully submitted,

LAWLER, FELIX & HALL,
WILLIAM T. COFFIN,
ROBERT HENIGSON,

By /s/ ROBERT HENIGSON,
Attorneys for Defendant Reliance Steel & Aluminum Co.

[Endorsed]: Filed August 29, 1958. [76]

[Title of District Court and Cause.]

PLAINTIFF'S ADMISSIONS PURSUANT TO
DEFENDANTS' SECOND REQUEST

Harry H. Meisner, Plaintiff herein, appearing propria persona, makes the following admissions pursuant to Defendants' second request:

1. He admits that Thomas J. Neilan died on November 17, 1957.

* * *

4. He denies Request No. 4. However he admits that Jack Moore represented to him by telephone July 21, 1957, that he had an agreement with Reliance Steel whereby he would receive a sales commission of 5% of the first \$1,000,000 plus 2½% of the balance of the sale [78] price for the stock, assets or business of Reliance Steel if and when such a sale were consummated.

5. He denies Request No. 5. However he admits that he reached an agreement with Jack Moore during the aforesaid July 21, 1957, telephone conversation between Moore and him whereby Moore promised that Plaintiff would receive one-half of the total sales commission from the sale of the stock, assets or business of Reliance Steel if he should be responsible for the consummation of such sale.

6. He admits that the photostat, marked Exhibit "C," attached to Defendants' Second Request and exhibited therewith is a true copy of a letter

of Jack Moore dated July 21, 1957 (hereinafter called the "Moore July 21 letter"), to him.

7. He admits that the Moore July 21 letter was executed on or about the date that it bears by Jack Moore and that he thereafter received the same on or about July 25 in the ordinary course of the United States mail.

8. He admits that the photostat, marked Exhibit "D," attached to Defendants' Second Request and exhibited therewith, is a true copy of a letter from him dated July 25, 1957 (hereinafter called the "Meisner July 25 letter"), to Jack Moore.

9. He admits that the Meisner July 25 letter was signed by him on or about the date that it bears and was thereupon deposited in the United States mail in an envelope addressed to Jack Moore with postage fully prepaid.

10. He denies the 10th Request. However he admits that the terms of the agreement made July 21, 1957, with Jack Moore are set forth in the Moore July 21 letter and the Meisner July 25 letter.

11. He denies the 11th Request. However he admits that the agreement made July 21, 1957, between him and Jack Moore was the agreement reached between him and Moore on or before November 12, 1957, in connection with the sale of the assets or the capital stock of Reliance Steel. [79]

12. He admits that the photostat, marked Exhibit "E," attached to Defendants' Second Request

and exhibited therewith, is a true copy of the letter from William T. Gimbel dated July 30, 1957 (hereinafter called the "Gimbel July 30 letter"), to him.

13. He admits that the Gimbel July 30 letter was signed by William T. Gimbel on or about the date that it bears and that it was thereafter received by him in the ordinary course of the United States mail.

* * *

16. He admits that the photostat, marked Exhibit "G," attached to Defendants' Second Request and exhibited therewith, is a true copy of a letter from Thomas J. Neilan dated October 7, 1957 (hereinafter called the "Neilan October 7 letter"), to him.

17. He admits that the Neilan October 7, 1957, letter was received by him in the ordinary course of the United States mail on or about October 10, 1957.

18. He admits that the photostat, marked Exhibit "H," attached to Defendants' Second Request and exhibited therewith, is a true copy of a letter from Thomas J. Neilan dated November 12, 1957 (hereinafter called the "Neilan November 12 letter").

19. He admits that the plain copy, marked Exhibit "J," attached to Defendants' Second Request and exhibited therewith, is a true copy of the enclosure (hereinafter called the "Neilan November

12 letter enclosure'') identified in the Neilan November 12 letter as "the enclosed letter." [80]

20. He admits that the Neilan November 12 letter and the Neilan November 12 letter enclosure were received by him in the ordinary course of the United States mail on or about November 15, 1957.

21. He denies Request 21. However he admits that the Gimbel July 30 letter, the Neilan October 7 letter and the Neilan November 12 letter are instruments in writing upon which he relies as evidence of his employment by Reliance Steel and Thomas J. Neilan, as set forth in his answer number 27 to Defendant Reliance Steel's first interrogatories to him.

22. He admits that he never executed the Neilan November 12 letter enclosure.

23. He admits that the photostat, marked Exhibit "K," attached to Defendants' Second Request and exhibited therewith, is a true copy of a letter from him dated November 18, 1957 (hereinafter called the "Meisner November 18 letter") to Thomas J. Neilan.

24. He admits that the photostat, marked Exhibit "L," attached to Defendants' Second Request and exhibited therewith, is a true copy of a letter enclosure dated November 18, 1957 (hereinafter called the "Meisner November 18 letter enclosure"), signed by him on or about the date that it bears, addressed to Thomas J. Neilan.

25. He admits that he signed the Meisner November 18 letter and the Meisner November 18 letter enclosure on or about the date they bear and promptly forwarded the same together by pre-paid United States mail to the addressee.

26. He denies Request 26. However he admits that the Meisner November 18 letter, the Meisner November 18 letter enclosure and the Neilan November 12 letter are writings which evidence the purported agreement he alleges was made in paragraph 5 of the first and second counts of his amended complaint, agreeably with his answers to defendant Reliance Steel's first interrogatories numbered 28, 29 and 30. [81]

* * *

30. That no agreement relative to who constituted the key personnel referred to in the purported sale agreement was ever reached between Myron Hokin and Reliance Steel or Thomas J. Neilan.

31. That no agreement relative to the form of the key personnel employment agreement, as contemplated by the purported sale agreement, was ever reached between Myron Hokin and Reliance Steel or Thomas J. Neilan.

32. That no draft of any proposed employment agreement was at any time submitted by Myron Hokin or his representatives to Reliance Steel or to any of its officers or employees. [82]

* * *

Dated October 31st, 1958.

Respectfully submitted,

/s/ HARRY H. MEISNER,

Plaintiff, Appearing in Pro-
pria Persona.

Affidavit of service by mail attached.

[Endorsed]: Filed November 3, 1958. [85]

[Title of District Court and Cause.]

PLAINTIFF'S ANSWERS TO
SECOND INTERROGATORIES

State of Michigan,
County of Wayne—ss.

Harry H. Meisner, being duly sworn, answers
Defendant's Second Interrogatories as follows:

* * *

4. Mr. Moore informed Meisner in July 11, 1957,
telephone conversation that Mr. Gimbel, executive
of the steel company, would call for appointment in
a week.

* * *

18. Not Applicable.

* * *

22. Not Applicable.

28-30. Questions 28 to 30, inclusive, are objected
to as immaterial hereto. [89]

* * *

33. He knows of no specific date upon which Defendants so refused.

34-35. He is unable to answer questions 34 and 35 for lack of information.

* * *

/s/ HARRY H. MEISNER.

Subscribed and sworn to before the undersigned at Detroit, Michigan, on October 31st, 1958.

[Seal] /s/ JOAN A. DUBOISE,
Notary Public, Wayne
County, Michigan.

My commission expires March 19th, 1961.

Affidavit of service by mail attached.

[Endorsed]: Filed November 3, 1958. [90]

[Title of District Court and Cause.]

DEFENDANTS' RESPONSES TO PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS

Defendants Reliance Steel & Aluminum Co. and Security-First National Bank, as Executor of the Will of Thomas J. Neilan, deceased, in response to the first request for admissions served by mail upon them by plaintiff on October 29, 1958, make the following statements:

Request No. 1: That on or about August 15, 1957, the Defendant, Reliance Steel & Aluminum Co., by Thomas J. Neilan, as its President and Chairman of the Board, made a proposal to sell and lease to Myron Hokin or his designee property as described and on terms contained [93] in the letter, of which a copy is hereto attached as exhibit numbered one (1), which was mailed to Myron Hokin on said date, and received by said Hokin shortly thereafter.

Response to Request No. 1: Defendants admit that on or about August 15, 1957, defendant Reliance Steel & Aluminum Co. made a proposal to sell and lease to Myron Hokin or his designee the property described in the letter, marked Exhibit "One," attached hereto and incorporated by reference herein, for the purchase price and rental payments and on the terms and subject to the conditions therein set forth; further admit that the addressee of such letter, said Myron Hokin, received the same on or about said date.

Request No. 2: That the Defendant, Reliance Steel & Aluminum Co., and Thomas J. Neilan individually were then willing and agreeable to sell such assets upon the terms specified in said letter of August 15, 1957, exhibit one (1).

Response to Request No. 2: Defendants admit that on or about August 15, 1957, defendant Reliance Steel & Aluminum Co. was willing to sell and lease the property described in said Exhibit "One" for the purchase price and rental payments and on the terms and subject to the conditions

therein set forth; further admit that Thomas J. Neilan was then willing that defendant Reliance Steel & Aluminum Co. sell and lease said property for such price and rental payments and on such terms and subject to such conditions.

Request No. 3: That on or about June 11, 1958, the Plaintiff presented his verified creditor's claim, containing the substance of the complaint filed in this cause, upon Security-First National Bank of Los Angeles, [94] as Executor of the Estate of Thomas J. Neilan, and one of the Defendants, herein, but that the same was rejected by said Executor on June 30, 1950, and by notice of rejection of claim dated July 2, 1958, and mailed to Plaintiff herein.

Response to Request No. 3: Defendants admit that on June 11, 1958, plaintiff presented his verified creditor's claim to defendant Security-First National Bank, as Executor of the Will of Thomas J. Neilan, deceased; further admit that said creditor's claim consisted of a printed form of claim provided for use in the Superior Court of the State of California in and for the County of Los Angeles to which was attached a copy of plaintiff's original complaint filed herein on June 2, 1958; further admit that said Executor rejected said claim on June 30, 1958; further admit that notice of rejection of said claim was duly given to plaintiff on July 2, 1958.

Request No. 4: That on September 30, 1957, and on October 2, 1957, the Defendant, Reliance Steel

& Aluminum Co., and Thomas J. Neilan, individually, as principal stockholder of Reliance Steel & Aluminum Co., were willing to sell the property described in the offer to purchase and the rider thereto described in and made Exhibit B to Defendants' First Request for Admissions.

Response to Request No. 4: Defendants admit that on September 30, 1957, and on October 2, 1957, defendant Reliance Steel & Aluminum Co. was willing to sell and lease the property described in said Exhibit "B" (attached to the first request for admissions served by defendant Reliance Steel & Aluminum Co. on plaintiff on August 4, 1953) for a purchase price and rental payments and on the terms and subject to the conditions therein set forth; further admit that Thomas J. Neilan [95] was then willing that defendant Reliance Steel & Aluminum Co. sell said property for such price and rental payments and on such terms and subject to such conditions; deny that said Thomas J. Neilan was then the principal shareholder of defendant Reliance Steel & Aluminum Co. but admit that he indirectly controlled a majority of its shares.

Request No. 5: That the signatures of Thomas J. Neilan (a) as President and Chairman of the Board of Reliance Steel & Aluminum Co., on page 3 of said Exhibit B described in the foregoing paragraph 4(b) individually, as principal stockholder of Reliance Steel & Aluminum Co., also on page 3

thereof, and (c) on the rider attached to said Exhibit B, were in fact the genuine signatures of said Thomas J. Neilan, and that he was duly authorized to make such signatures (a) and (c) and to execute said instruments for and on behalf of Reliance Steel & Aluminum Co.

Response to Request No. 5: Defendants admit the truth of the matter set forth in request No. 5.

Request No. 6: That Myron Hokin and the H. W. & G. Corporation as his designee were on October 2, 1957, ready, willing and able to perform the obligation of the purchaser or purchasers under said Exhibit B referred to in the two preceding paragraphs, 4 and 5.

Response to Request No. 6: Defendants cannot truthfully admit or deny that Myron Hokin or H. W. & G. Corporation was, on or about October 2, 1957, ready, willing or able to purchase the property described in the aforesaid Exhibit "B," for the price and on the terms and subject to the conditions therein set forth, for the reason that defendants have no knowledge of the intent or financial ability of said Myron Hokin or [96] said H. W. & G. Corporation or, for that matter, of even the juridical existence of said H. W. & G. Corporation; deny that said Exhibit "B" imposed any obligation upon said Myron Hokin, H. W. & G. Corporation, Thomas J. Neilan, or defendant Reliance Steel & Aluminum Co.

Request No. 7: That the Defendants have not at

any time performed the obligations imposed upon the Defendants and upon Thomas J. Neilan during his lifetime by said offer to purchase and rider Exhibit B described in paragraph 3 hereof.

Response to Request No. 7: Defendants deny that said Exhibit "B" imposed any obligation upon defendant Reliance Steel & Aluminum Co. or upon Thomas J. Neilan in his lifetime or upon defendant Security-First National Bank, as Executor of the Will of Thomas J. Neilan, deceased.

Request No. 8: That the Defendants have in their possession an original copy or copies of the August 15, 1957 letter to Hokin.

Response to Request No. 8: Defendants admit that they have in their possession a copy of the aforesaid August 15, 1957, letter, Exhibit "One" attached hereto.

Request No. 9: If answer to (8) is yes, please attach copy thereof to your admissions.

Response to Request No. 9: Defendants have attached a true copy of the aforesaid August 15, 1957, letter as Exhibit "One" hereto.

LAWLER, FELIX & HALL,
WILLIAM T. COFFIN,
ROBERT HENIGSON,

By /s/ ROBERT HENIGSON,
Attys. for Defendants. [97]

EXHIBIT NO. 1

August 15, 1957.

Mr. Myron Hokin,
600 West 41st Street,
Chicago, Illinois.

Dear Mr. Hokin:

This will confirm our proposal to you (that is, the proposal of Reliance Steel and Aluminum Company, herein called "Reliance" and Thomas J. Neilan undersigned as its principal stockholder) to sell and to lease to you (or to your designee) the following described assets and properties of Reliance upon the indicated terms:

1. Reliance will sell its following described assets for the indicated prices:

(a) All of its inventories at a price equal to:
(i) the book value of inventories (book value means lower of cost or market, determined on the same basis as that followed in prior periods), plus (ii) the sum of \$400,000.

(b) All machinery and equipment, autos and trucks, and office furniture and fixtures at a price of \$300,000.

(c) Deferred Assets at a price equal to the book value thereof.

(d) All catalogs, customers' lists, sales and purchase records, name, goodwill and similar assets for \$3,000.

2. The land and building located at 2600 East 26th Street, Vernon, California, shall be leased upon the following terms:

(a) Term of ten years.

(b) Gross rental of \$69,500 per year, payable monthly.

(c) Landlord to pay city and county real estate taxes and fire and extended insurance coverage. Tenant to maintain premises in clean condition and in good repair, ordinary wear and tear and damage by fire or the elements excepted, unless caused by the negligence of the tenant. Lessor shall pay for replacements and repairs made necessary by ordinary wear and tear and damage by the elements, except when caused by the negligence of the tenant. Tenant to pay any increase in city and county real estate taxes over the amount thereof for 1957.

(d) Tenant has option to purchase land and building for total price of \$600,000 at any time during the first ten year period. [98]

3. Reliance will get ten year extension of existing lease covering 37th Street property, including crane therein, the rental for the additional period beginning January 15, 1960, of not more than \$25,000 per year. Such lease as extended will be either assigned to you or a sublease will be given to you. You shall pay rental payable thereunder.

4. Reliance will lease to you for ten years its building and two cranes therein, located at 37th

Street leased property, for a gross rental of \$7,200 per year. Tenant shall have option to purchase Reliance's building and two cranes therein at any time during the term of such lease for \$58,000.

5. Thomas J. Neilan will agree not to compete in the State of California for a period of five years.

6. The consummation of this sale and lease is to be conditioned upon all of the following:

(a) Approval by Kaiser Aluminum and by Dow Chemical of this transaction, and their approval and agreement to continue present consignment and distributorship agreements with the purchaser.

(b) Complete physical inventory and audit by Kaiser and Dow of consignment inventories.

(c) Physical inventory of purchased inventories referred to in Paragraph 1 (a).

(d) Present key personnel to enter into mutually satisfactory employment agreements with the purchaser.

If you find this proposal satisfactory a mutually agreeable contract and escrow will be entered into, which will provide for the deposit by the purchaser of \$250,000.

This proposal shall be acted upon by you within ten days from date.

Very truly yours,

RELIANCE STEEL &
ALUMINUM CO.

By THOMAS J. NEILAN,
President and Chairman of
the Board.

BH:b

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed November 10, 1958. [99]

[Title of District Court and Cause.]

MEMORANDUM OF CONTENTIONS OF FACT AND LAW

Concise Statement of Material Facts

1. Jurisdiction of the district court is founded upon diversity of citizenship and an amount in controversy which exceeds, exclusive of interest and costs, the sum of \$3,000.00.

2. Plaintiff is a citizen of the State of Michigan and a lawyer admitted to practice and practicing law in that State.

3. Defendant Reliance Steel & Aluminum Co. (hereinafter called "Reliance Steel") is a corporation organized and existing under the laws of the State of California and principally engaged [102] in the business of jobbing fabricated steel and aluminum.

4. Defendant Security-First National Bank (hereinafter called the "Bank") is a national bank-

ing association organized and existing under the laws of the United States of America and having its principal place of business in the State of California. The Bank is sued in its capacity as executor of the will of Thomas J. Neilan (hereinafter called "Neilan"), who died November 17, 1957. In his lifetime, Neilan was the president and one of the directors, and indirectly controlled a majority of the shares of the issued and outstanding capital stock, of Reliance Steel. The Bank is the duly appointed, qualified and acting executor of Neilan's will in probate proceedings now pending in the Superior Court of the State of California in and for the County of Los Angeles (L. A. Superior Court No. 397,909).

5. On or about April 4, 1958, plaintiff first learned from an advertisement in the April 2, 1957, edition of the Wall Street Journal that a West Coast steel jobbing business was for sale. The text of the advertisement is as follows:

"Steeling Warehouse

"Business for Sale.

"Old Established West Coast Steel Jobber.

"56 Sales—\$13,125,000.

"Profit After Taxes—\$717,000.

"Book Value—\$2,500,000.

"Will take \$3,400,000 or accept exchange of stock in reliable company.

“Principals only.

“Box CQ-12, The Wall Street Journal, 711 W. Monroe Street, Chicago 6, Illinois.” [103]

6. On or about April 8, 1957, plaintiff made letter inquiry to the box number expressing interest in purchase of the business. On or about April 12, 1957, the anonymous advertiser replied by letter enclosing limited financial data relative to Reliance Steel and identifying himself as one Jack Moore (hereinafter called “Moore”). Moore did not disclose the identity of the business, its form of structure, the principals involved or his relationship to the business. A desultory correspondence between Moore and plaintiff ensued. Neither party made disclosure of the identity of the entities he represented.

7. On or about June 15, 1957, Moore advised Neilan of the interest of plaintiff’s client in the purchase of the business of Reliance Steel. Neilan thereupon instructed one of the officers of Reliance Steel, William T. Gimbel (hereinafter called “Gimbel”) to contact plaintiff to determine the identity of the principals that plaintiff represented and to obtain a more precise idea of their interest. Neilan thereafter advised Moore of his instructions to Gimbel.

8. On or about July 11, 1957, Moore disclosed the identity of the business to plaintiff by telephone. He advised plaintiff of Gimbel’s imminent arrival

in Chicago on the business of Reliance Steel. Plaintiff invited a conference with Gimbel.

9. On July 20, 1957, Gimbel visited plaintiff in plaintiff's law offices in Detroit. Plaintiff refused to divulge his client's identity without first obtaining Reliance Steel's written commitment that he, plaintiff, would be entitled to a broker's commission in the event of consummation of a sale of the business of Reliance Steel on terms satisfactory to it. Gimbel advised plaintiff that, in the event of the consummation of a sale of the business on terms satisfactory to Reliance Steel to purchasers produced by [104] plaintiff, any commission compensation would be paid Moore, not plaintiff. Gimbel further advised plaintiff that Moore had no financial interest in Reliance Steel, that invitations for offers to purchase the business of Reliance Steel had been made to persons other than Moore, and that Moore had no exclusive broker's agreement nor any agreement with Reliance Steel but only an informal arrangement with Neilan respecting commissions.

10. On July 21, 1957, plaintiff telephoned Moore to obtain a commission participation commitment. Moore represented to plaintiff that he had an agreement with Reliance Steel whereby he, Moore, would receive a sales commission of 5% of the first million dollars plus $2\frac{1}{2}\%$ of the balance of the purchase price for the stock, assets or business of Reliance Steel if and when such a sale were consummated. In the course of the telephone con-

versation, plaintiff and Moore reached an agreement whereby Moore promised plaintiff one-half the total sales commission realized by Moore from the sale of the stock, assets or business of Reliance Steel if plaintiff were responsible for the consummation of such sale. That agreement was confirmed by an exchange of letters between Moore and plaintiff.

11. Believing himself assured of participation in a sales commission by his agreement with Moore, plaintiff wrote Moore a July 29, 1957, letter, copy to Gimbel, disclosing the names of the persons he claimed to be prospective purchasers. On or about July 30, 1957, Gimbel wrote plaintiff a letter confirming his July 20 conversation with plaintiff and relating that Moore had the opportunity to locate an acceptable buyer for the business of Reliance Steel under an informal agreement whereby Moore would receive a fee commensurate with his efforts.

12. On or about August 5, 1958, a representative or [105] associate of Myron Hokin, one of the persons proposed by plaintiff as interested in the purchase, arrived in Los Angeles to visit the premises where plaintiff's business was conducted. Thereafter and on or about August 12, 1957, plaintiff and Myron Hokin and several of Hokin's associates came to Los Angeles to open negotiations for the purchase of the business on a cash basis. Hokin could not raise sufficient cash to meet Reliance Steel's price of approximately \$3,750,000.00 for the assets of the corporation. Reliance Steel was will-

ing to retain some of its assets and to lease the same to the purchaser; the purchase price would thereby be reduced to about \$3,200,000.00. An outline of Reliance Steel's proposal was embodied in its August 15, 1957, letter to Hokin.

13. On or about August 27, 1957, Hokin and his associates again came to Los Angeles accompanied by a Mr. Haase, a Vice-President of First National Bank of Chicago, the financing agency in the transaction. After extended discussion with Reliance Steel, Hokin withdrew from the negotiations because the parties were unable to agree on the purchase price and other material terms of the sale.

14. In September, 1957, plaintiff made effort to revive the deal. Plaintiff procured from Hokin in Chicago:

a. Hokin's September 30, 1957, letter addressed to Reliance Steel setting forth a conditional offer to purchase the therein identified assets of the corporation;

b. Hokin's September 30, 1957, letter to Paul D. Dodds, a Vice-President of the Bank, enclosing a copy of the above conditional offer and notifying the Bank of his intention to open an escrow "subject to the parties' entering into a mutually satisfactory contract";

c. A cashier's check drawn in favor of the Bank by The First National Bank of Chicago in the sum of \$250,000.00. [106]

15. Plaintiff enplaned for California armed with the check and letters. On behalf of Hokin, he presented the proposal to Reliance Steel in Los Angeles. Further negotiations with Reliance Steel were pursued in that City by plaintiff. In an effort to induce Reliance Steel to sell the assets identified in Hokin's September 30, 1957, letter, at the reduced price therein provided for, plaintiff stated he would forego one-half of the share of the total sales commission to which he would be entitled under his agreement with Moore, thus reducing the total sales commission payable by Reliance Steel in the event a sale were consummated. As a result of the negotiations in Los Angeles and the plaintiff's representation relative to his share of the commission, Reliance Steel and Neilan endorsed the Hokin September 30, 1957, letter after first preparing and attaching thereto a rider bearing date October 2, 1957. Plaintiff left the Hokin letter to Dodds and the \$250,000.00 cashier's check with Neilan and returned to Chicago to obtain Hokin's approval of the October 2, 1957, rider. Plaintiff obtained the approval of Hokin in Chicago and dispatched the approved rider to Neilan by mail, together with instructions to present the cashier's check and the Hokin letter to Dodds at the Bank. Neilan complied.

16. Thereafter the parties, through their respective counsel, endeavored to work out and agree upon a formal written contract. The initial draft of the contract was prepared by Chicago counsel for

Hokin. This draft was not acceptable to Reliance Steel or Neilan or their counsel. Hokin then employed Los Angeles counsel who prepared a second draft. At about the same time as the preparation of the second draft, Los Angeles counsel for Hokin prepared a draft of escrow instructions, a draft of supplemental escrow instructions and a draft of the lease referred to in the September 30, 1957, letter and the October 2, 1957, rider attached thereto. [107] None of these drafts was acceptable to Reliance Steel or Neilan or their counsel. The latter thereupon prepared a draft of the formal written contract of purchase and sale, but this draft was unacceptable to counsel for Hokin in divers respects as specified in a November 1, 1957, letter addressed by Chicago counsel for Hokin to counsel for Reliance Steel. Reliance Steel thereupon employed additional counsel to prepare yet another draft of the formal written contract. Such draft was completed and transmitted to counsel for Hokin about November 12, 1957. No written response respecting that draft was ever made by Hokin, his nominee or anyone acting on their behalf.

17. Meanwhile, Neilan dispatched a November 12, 1957, letter to plaintiff. Enclosed therewith was a form of letter for plaintiff's execution providing for direct payment of a sales commission to plaintiff by Reliance Steel if and when a formal contract of purchase and sale were executed and the sale consummated and provided that plaintiff

would forego one-half of the commission to which he would be otherwise entitled under his agreement with Moore. Plaintiff did not execute the Neilan November 12 letter enclosure. Instead, on November 18, 1957, plaintiff wrote Neilan enclosing a letter bearing the same date wherein he offered to accept a flat fee of \$30,000.00 payable directly to him on the close of escrow if and when a formal purchase and sale agreement were executed and the sale consummated. Neilan died November 17, 1957, prior to the dispatch of plaintiff's letter offer. [108]

Dated this 19th day of November, 1958.

LAWLER, FELIX & HALL,
WILLIAM T. COFFIN,
ROBERT HENIGSON,

By /s/ ROBERT HENIGSON,
Attorneys for Defendants Reliance Steel & Aluminum Co. and Security-First National Bank, as
Executor, etc.

Affidavit of service by mail attached.

[Endorsed]: Filed November 19, 1958.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR
SUMMARY JUDGMENT
(Rule 56, F.R.C.P.)

To the Plaintiff Above Named:

You will please take notice that on Monday, the 8th day of December, 1958, at 9:30 a.m., or as soon thereafter as the matter can be heard, in Court Room No. 2 at the United States Court House in the City and County of Los Angeles, State of California, defendant Reliance Steel & Aluminum Co. (hereinafter called "Reliance Steel") and defendant Security-First National Bank (hereinafter called the "Bank"), as Executor of the Will of Thomas J. Neilan (hereinafter called "Neilan"), deceased, will move the court for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, directing the [127] entry of summary judgment in favor of said defendants upon each of the following grounds:

1. There is no genuine issue as to any material fact to be tried or determined herein.

2. Jack Moore is an indispensably necessary party to a full and final adjudication of this action and he has not been made a party hereto.

3. The only contract of employment to which plaintiff was hired in connection with the purchase and sale of the assets or the capital stock of Reliance Steel was one between him and Jack Moore.

Neither Neilan in his lifetime, the Bank as such Executor nor Reliance Steel was ever a party to a contract of employment with plaintiff, or with plaintiff and Jack Moore.

4. The consummation of a purchase and sale of the assets or the capital stock of Reliance Steel was, under the contract alleged by plaintiff, a condition precedent to liability for broker's commissions. No such purchase and sale was ever consummated and no valid and enforceable contract of purchase and sale was ever made.

5. Plaintiff unlawfully participated in the negotiations conducted within the State of California for a contract covering the purchase and sale of the assets of Reliance Steel and is thereby barred from recovery of a broker's commission even had he been employed by Reliance Steel and Neilan, or either of them, so to do and even had a purchase and sale been consummated or an enforceable contract of purchase and sale been made.

The Bank as such Executor moves for an order directing the entry of summary judgment in its favor on the further grounds as follows: [128]

6. This action was prematurely commenced against the Bank as such executor for the reason that no creditor's claim was first presented to it or filed with clerk of the court in which the proceedings relative to Neilan's estate were pending.

7. The creditor's claim presented by plaintiff to the Bank as such Executor subsequent to the

commencement of this action was rejected in its entirety and no action was commenced thereon in the manner and within the time provided by law.

Said motion will be based upon this notice, upon the summary statement of pleadings, jurisdictional facts and plaintiff's admissions and answers to interrogatories attached hereto and made a part hereof, upon the affidavit of William T. Gimbel attached hereto and made a part hereof, upon the memorandum of points and authorities attached hereto and in support hereof and upon all the pleadings, records and files herein.

Dated this 28th day of November, 1958.

LAWLER, FELIX & HALL,
WILLIAM T. COFFIN,
ROBERT HENIGSON,

By /s/ ROBERT HENIGSON,
Attorneys for Defendants.

Summary Statement of Pleadings, Jurisdictional
Facts and Plaintiff's Admissions and Answers
to Interrogatories

1. Jurisdiction of the court; the parties to the action. Jurisdiction of the court is founded upon diversity of citizenship and an amount in controversy which exceeds, exclusive of interest and costs, the sum of \$3,000.00. Plaintiff is a citizen of the State of Michigan. Defendant Reliance Steel & Aluminum Co. (hereinafter called "Reliance Steel")

is a corporation organized and existing under the laws of the State of California. Defendant Security-First National Bank (hereinafter called the "Bank") is a national banking association organized and existing under the laws of the United States of America, having its principal place of business in the State of California. The Bank is sued in its capacity as Executor of the Will of Thomas J. Neilan (hereinafter called "Neilan"), who died November 17, 1957. In his lifetime, Neilan was the president and one of the directors, and indirectly controlled a majority of the shares of the issued and outstanding capital stock, of Reliance Steel. The Bank is the duly appointed, qualified and acting Executor of Neilan's Will in probate proceedings now pending in the Superior Court of the State of California in and for the County of Los Angeles (L. A. Superior Court No. 397,909).

2. The alleged employment agreement. Paragraph 4 of the first and second counts of plaintiff's amended complaint alleges that Reliance Steel and Neilan employed plaintiff and Jack Moore "by various instruments in writing * * * to find a purchaser ready, willing and able to purchase * * *" the assets or capital stock [130] of Reliance Steel on terms mutually acceptable to buyer and seller. Paragraph 5 of the first and second counts of plaintiff's amended complaint alleges that a subsequent agreement was made between the parties providing that one-half the commission payable should be paid directly to plaintiff and the other half to Jack Moore.

In response to the following interrogatories served upon plaintiff by Reliance Steel:

“27. Identify by date and signatory or signatories all the ‘various instruments in writing’ referred to in paragraph 4 of the first and second counts of the complaint and state of which such instruments you have a copy or the original.

“28. When was the agreement referred to in paragraph 5 of the first and second counts of the complaint made?”

plaintiff answered under oath:

“27. Instruments in writing.

a. July 30, 1957, Letter Gimbel to Meisner on Reliance letterhead.

b. Oct. 7, 1957, Letter Neilan to Meisner on Reliance letterhead.

c. Nov. 12, 1957, Letter Neilan to Meisner on plain paper, but signed as President, Reliance Steel.

“28. By letters November 12, 1957, and November 18, 1957.” In response to Reliance Steel’s second request for admissions served upon plaintiff, plaintiff admitted that the photostats marked, respectively, Exhibits “E,” “G,” “H” and “K,” copies of which are attached hereto, are true copies of the letters referred to in plaintiff’s above answers.

Defendants submit that none of these letters evidence an [131] employment agreement between Neilan and Reliance Steel, or either of them, and plaintiff.

In response to Reliance Steel's second request for admissions Nos. 4 to 11, inclusive, as follows:

"4. Admit that Jack Moore represented to you by telephone July 21, 1957, that he had an agreement with Reliance Steel whereby he would receive a sales commission of 5% of the first \$1,000,000 plus 2½% of the balance of the sale price for the business of Reliance Steel if and when such a sale were consummated.

"5. Admit that you reached an agreement with Jack Moore during the aforesaid July 21, 1957, telephone conversation between you and him whereby Moore promised to pay you one-half of the total sales commission he received on account of the sale of the business of Reliance Steel if you were responsible for the consummation of such sale.

"6. Admit that the photostat, marked Exhibit 'C,' attached hereto and exhibited herewith is a true copy of a letter of Jack Moore dated July 21, 1957 (hereinafter called the 'Moore July 21 letter'), to you.

"7. Admit that the Moore July 21 letter was executed on or about the date that it bears by Jack Moore and that you thereafter received the same on or about July 25 in the ordinary course of the United States mail.

"8. Admit that the photostat, marked Exhibit 'D,' attached hereto and exhibited herewith, is a true copy of a letter from you dated July 25, 1957 (here-

inafter called the 'Meisner July 25 letter'), to Jack Moore.

"9. Admit that the Meisner July 25 letter was signed by you on or about the date that it bears and was thereupon [132] deposited in the United States mail in an envelope addressed to Jack Moore with postage fully prepaid.

"10. Admit that the terms of your employment agreement made July 21, 1957, with Jack Moore are fully set forth in the Moore July 21 letter and the Meisner July 25 letter.

"11. Admit that the employment agreement made July 21, 1957, between you and Jack Moore was the only employment agreement ever reached by you on or before November 12, 1957, in connection with the sale of the assets or the capital stock of Reliance Steel.",

plaintiff admitted under oath the truth of the matters set forth in said requests Nos. 6 to 9, inclusive, and responded to requests Nos. 4, 5, 10 and 11 as follows:

"4. He denies Request No. 4. However he admits that Jack Moore represented to him by telephone July 21, 1957, that he had an agreement with Reliance Steel whereby he would receive a sales commission of 5% of the first \$1,000,000 plus 2½% of the balance of the sale price for the stock, assets or business of Reliance Steel if and when such a sale were consummated."

“5. He denies Request No. 5. However he admits that he reached an agreement with Jack Moore during the aforesaid July 21, 1957, telephone conversation between Moore and him whereby Moore promised that Plaintiff would receive one-half of the total sales commission from the sale of the stock, assets or business of Reliance Steel if he should be responsible for the consummation of such sale.”

“10. He denies the 10th Request. However he admits that the terms of the agreement made July 21, 1957, with [133] Jack Moore are set forth in the Moore July 21 letter and the Meisner July 25 letter.

“11. He denies the 11th Request. However he admits that the agreement made July 21, 1957, between him and Jack Moore was the agreement reached between him and Moore on or before November 12, 1957, in connection with the sale of the assets or the capital stock of Reliance Steel.”

In answer to No. 18 of Reliance Steel's second set of interrogatories served on plaintiff, as follows:

“18. If your response to number 11 of this defendant's second request for admissions is a denial, set forth the terms of each of the alleged employment agreements made by you before November 12, 1957, in connection with the sale of the assets or the capital stock of Reliance Steel, state when, with whom and in whose presence each such employment agreement was made and identify which of such alleged employment agreements, if any, are evidenced by a writing.”,

plaintiff replied under oath “Not Applicable.”

Defendants submit that plaintiff's refusal to set forth the making or the terms of any other employment agreement but the one evidenced by Exhibits "C" and "D," copies of which are attached hereto, is a tacit admission that none other exists. Plaintiff's employment agreement in connection with the sale of the assets or capital stock of Reliance Steel, if any such agreement exists at all, is one between Jack Moore and plaintiff, not between Reliance Steel and Neilan, or either of them, and plaintiff. Jack Moore is, therefore, an indispensable party to a final adjudication of this action.

Even were plaintiff able to establish the joint agreement alleged in paragraph 4 of the first and second counts of his amended [134] complaint (and his answers and admissions refute such possibility), Jack Moore remains an indispensable party to this action. By alleging the making of a subsequent agreement whereby he became entitled to direct payment of one-half the commissions payable on consummation of a sale, plaintiff seeks to avoid the impact of the jurisdictional requirements that indispensable parties must be joined. The subsequent agreement was made according to plaintiff (See answer No. 28, *supra*) by an exchange of letters between him and Neilan dated, respectively, November 12 and 18, 1957.

Responsive to Reliance Steel's second request for admissions served upon plaintiff, Nos. 18 and 19, 23 and 24, as follows:

“18. Admit that the photostat, marked Exhibit ‘H,’ attached hereto and exhibited herewith, is a true copy of a letter from Thomas J. Neilan dated November 12, 1957 (hereinafter called the ‘Neilan November 12 letter’).

“19. Admit that the plain copy, marked Exhibit ‘J,’ attached hereto and exhibited herewith, is a true copy of the enclosure (hereinafter called the ‘Neilan November 12 letter enclosure’) identified in the Neilan November 12 letter as ‘the enclosed letter’.”

“23. Admit that the photostat, marked Exhibit ‘K,’ attached hereto and exhibited herewith, is a true copy of a letter from you dated November 18, 1957 (hereinafter called the ‘Meisner November 18 letter’), to Thomas J. Neilan.

“24. Admit that the photostat, marked Exhibit ‘L,’ attached hereto and exhibited herewith, is a true copy of a letter enclosure dated November 18, 1957 (hereinafter called the ‘Meisner November 18 letter enclosure’), signed by you on or about the date that it bears, addressed to Thomas J. Neilan.”, [135]

plaintiff admitted that said Exhibits “H,” “J,” “K” and “L,” copies of which are attached hereto, are the November 12 and 18, 1957, letters exchanged between him and Neilan and the therein mentioned enclosures.

Plaintiff has also admitted that he did not execute the Neilan November 12 letter enclosure (Exhibit

“L”),¹ which as a matter of law constituted an offer on the part of Neilan not accepted by plaintiff. Instead, plaintiff prepared and executed the Meisner November 18 letter and the Meisner November 18 letter enclosure on or about the date they bear and forwarded the same by United States mail to Neilan, the addressee.² The provisions of the Meisner November 18 letter enclosure are materially different than those of the Neilan November 12 letter enclosure; as a matter of law, plaintiff’s November 18 letter enclosure constituted a counter offer.

Neilan died November 17, 1957.³ Therefore, there could have been no acceptance of plaintiff’s counter

¹Reliance Steel’s second request for admissions, No. 22:

“22. Admit that you never executed the Neilan November 12 letter enclosure.”

and plaintiff’s response thereto:

“22. He admits that he never executed the Neilan November 12 letter enclosure.”

²Plaintiff’s response No. 25 to Reliance Steel’s second request for admissions is as follows:

“25. He admits that he signed the Meisner November 18 letter and the Meisner November 18 letter enclosure on or about the date they bear and promptly forwarded the same together by prepaid United States mail to the addressee.” [136]

³Plaintiff’s response No. 1 to Reliance Steel’s second request for admissions is as follows:

“1. He admits that Thomas J. Neiland [sic] died on November 17, 1957.”

offer by Neilan, and there was no such acceptance by Reliance Steel.

3. The purported purchase and sale agreement.

Plaintiff contends that he performed the alleged employment agreement and became entitled to a commission on or about October 2, 1957.⁴ The validity of that contention rests upon his further contention that the September 30, 1957, letter and October 2, 1957, rider attached thereto constitute a valid and enforceable purchase and sale contract between Reliance Steel, as seller, and Myron Hokin, as buyer.⁵

⁴No. 45 of Reliance Steel's first set of interrogatories served upon plaintiff and plaintiff's answer thereto are as follows:

(Interrogatory.)

"45. State the date upon which you contend you completed your performance and were entitled to a commission."

(Answer.)

"45. On or about October 2, 1957, when Myron Hokin signed the rider described in (35)." [137]

⁵See paragraph 6 of the first and second counts of plaintiff's original and amended complaints.

No. 35 of Reliance Steel's first set of interrogatories served on plaintiff and plaintiff's answer thereto are as follows:

(Interrogatory.)

"35. Identify by date and signatories the written agreement first referred to in paragraph 6 of the first and second counts of the complaint."

Further to support the latter contention, plaintiff alleges that a \$250,000.00 deposit on the purchase price was made.⁶

Reliance Steel's first interrogatories to plaintiff, Nos. 51 and 52 as follows:

"51. Was the deposit accompanied by written instructions regarding the disposition of the funds?

"52. If your answer to interrogatory number 51 is yes, identify the writing or writings by date and signatories and state of which such writings you have a copy or the original."

evoked plaintiff's answer:

"51 and 52. Yes in letter from Myron Hokin to [138] Paul D. Dodds, Senior Vice President of Security First National Bank dated on or about September 30, 1957."

(Answer.)

"35. Agreement September 30, 1957, as amended signed by Myron Hokin and accepted subject to rider by Reliance Steel and Aluminum Company, by T. J. Neilan, its President and Chairman of the Board, and by Thomas J. Neilan, individually, as Principal Stockholder of Reliance Steel and Aluminum Company. The rider is stated to be approved October 2, 1957, and signed by Reliance Steel and Aluminum Company by Thomas J. Neilan and by Myron Hokin."

⁶See paragraph 6 of the first and second counts of plaintiff's original and amended complaints.

Plaintiff next admitted the truth of the matters set forth in Reliance Steel's first request for admissions as follows:

"1. That the photostat, marked Exhibit 'A,' attached hereto and exhibited herewith is a true copy of a letter (hereinafter called 'said letter') of Myron Hokin dated September 30, 1957, to Mr. Paul D. Dodds, Senior Vice President, Security-First National Bank of Los Angeles;

"2. That the photostat, marked Exhibit 'B,' attached hereto and exhibited herewith, is a true copy of the enclosure (hereinafter called 'said enclosure') identified in said Exhibit 'A' as 'proposal submitted to Reliance Steel & Aluminum Company and Thomas J. Neilan';

"3. That said letter was executed on or about the date that it bears, viz., September 30, 1957, by said Myron Hokin;

"4. That said letter and said enclosure, together with a cashier's check payable to the order of Security-First National Bank of Los Angeles in the sum of \$250,000, were delivered to the addressee on or about October 3, 1957;

"5. That said \$250,000 check is the sum alleged in paragraph 6 of the first and second counts of plaintiff's amended complaint to be a deposit on the purchase price for the sale of certain assets of Reliance Steel & Aluminum Co. to Myron Hokin, individually and as agent for H. W. & G. Corporation;".

"7. That said enclosure, comprising four pages,

is a true copy of the instrument alleged in paragraph 6 of the [139] first and second counts of plaintiff's amended complaint to be the written agreement entered into between Myron Hokin, individually and as agent for H. W. & G. Corporation, and Reliance Steel & Aluminum Co. and Thomas J. Neilan;

"8. That said enclosure is a copy of the only purported agreement upon which plaintiff relies in his contention that he found a purchaser ready, willing and able to purchase or acquire the assets or the capital stock of Reliance Steel & Aluminum Co. on terms mutually agreeable to the prospective purchaser and to Reliance Steel & Aluminum Co. and Thomas J. Neilan."

Copies of Exhibits "A" and "B" attached to said request are attached hereto for the convenience of the court.

Reference to Exhibit "A" reveals that the \$250,000.00 check was not a deposit on the purchase price. The Bank was expressly instructed to hold the check "pending further directions" and pending the parties' entering into a mutually satisfactory contract and escrow agreement. Indeed, no escrow was to be opened, as the letter of instructions and as the "enclosed proposal" (Exhibit "B") itself provided, unless and until a mutually satisfactory contract was made.

By the letter of instructions (Exhibit "A"), the prospective buyer, Myron Hokin, clearly contem-

plated further negotiations to the end of consummating a mutually satisfactory contract. That letter aside, the purported sale agreement itself (Exhibit "B") constitutes nothing more than an agreement to agree. The provisions of the purported sale agreement are explicitly made nugatory unless and until a formal contract was executed by the parties. Further, consummation of the sale and lease of the property therein described [140] was expressly conditioned, *inter alia*, upon: (i) obtaining the approval of designated suppliers to Reliance Steel to continue their present consignment and distributorship agreements with the prospective purchaser; and, (ii) the execution by and between such prospective purchaser and the "present key personnel" of Reliance Steel of "mutually satisfactory employment agreements."

The purported sale agreement itself contemplates further negotiations. The October 2, 1957, rider provides in part that the prospective purchaser shall negotiate the procurement of the agreement and approval of said suppliers to continue their consignment and distributorship agreements. It also provides that the purchaser shall complete his negotiations with "present key personnel" relative to the consummation of mutually satisfactory employment agreements prior to the determination of the price of the assets contemplated to be sold. In addition, the rider explicitly calls for a "lease satisfactory to both parties as to form."

Either party, by the very terms of the undertak-

ing, could refuse to agree to anything to which the other party might agree. Under such conditions, any promise made is unenforceable. The purported sale agreement was not, therefore, a valid and enforceable contract. It being the only purported sale agreement upon which plaintiff relies in his contention that he performed his alleged employment agreement (see the admitted request No. 8, *supra*), plaintiff must fail in this action.

4. Plaintiff's unlawful activity.

Plaintiff alleges in paragraph 4 of the first and second counts of his amended complaint that he was employed to find a purchaser for the assets or the capital stock of Reliance Steel on terms mutually acceptable to buyer and seller. The affidavit of [141] William T. Gimbel, attached hereto and in support hereof, reveals that plaintiff was actively engaged in California in the negotiations for the purchase and sale of the assets of Reliance Steel and, indeed, that plaintiff was primarily responsible for the execution by Neilan of the purported purchase and sale agreement (Exhibit "B").

Plaintiff is not now and never has been licensed as a real estate broker or salesman or as a business opportunity broker or salesman by the Real Estate Commissioner of the State of California.⁷ Plaintiff's

⁷Plaintiff answered in the negative each of the following interrogatories, comprising a part of Reliance Steel's first set of interrogatories served on plaintiff:

"57. Are you now or have you ever been licensed by the Real Estate Commissioner of the

activity in the State of California was, therefore, unlawful, and he is not under any circumstances entitled to compensation under the California substantive law.

5. Premature nature of the action against the Bank.

Plaintiff's complaint was filed with the court on June 2, 1958. No prior filing with the probate court of a creditor's claim against Neilan's estate and no prior presentation of the same to the Bank, as Executor of Neilan's will, is alleged. Absence of the allegation is not the result of inadvertence on the part of plaintiff. Paragraph 8 of the first and second counts of plaintiff's amended complaint alleges presentation to the Bank, as such Executor, of [142] plaintiff's claim against Neilan's estate on or about June 10, 1958. (The actual date of presentation was June 11, 1958). Under the California substantive law, no claim arose against the Bank until rejection by the Executor of the claim presented or inaction by the Executor for a period of ten days after presentment. Thus, no claim existed against the Bank at the time of the filing of plaintiff's [143] complaint.

State of California as a real estate broker or salesman?"

"59. Are you now or have you ever been licensed by the Real Estate Commissioner of the State of California as a business opportunity broker or salesman?"

EXHIBIT A

Copy

September 30, 1957.

Mr. Paul D. Dodds,
Senior Vice President,
Security-First National Bank
of Los Angeles,
Sixth and Spring Streets,
P. O. Box 2097,
Los Angeles, California.

Dear Mr. Dodds:

There is delivered to you herewith Cashier's Check No. E-482528 drawn on The First National Bank of Chicago, dated September 27, 1957, and payable to the order of your Bank, in the amount of \$250,000.

Enclosed you will please find copy of proposal submitted to Reliance Steel & Aluminum Company and Thomas J. Neilan, its principal stockholder, relating to the sale and lease of certain of its assets and property upon the terms set forth therein, which has been accepted and approved. The enclosed proposal provides for the creation of an escrow with your Bank in the event that the proposal is accepted within the term provided therein, and subject to the parties entering into a mutually satisfactory contract. The within check is to be held by you for deposit into said escrow with your Bank pending the parties entering into the said contract and escrow agreement.

We would appreciate your so retaining and holding the enclosed check pending further directions.

Very truly yours,

/s/ MYRON HOKIN. [144]

EXHIBIT B

September 30, 1957.

Reliance Steel & Aluminum Company
and Thomas J. Neilan, Its Principal
Stockholder,
Los Angeles, California.

Gentlemen :

The undersigned hereby offers to purchase from you and to lease from you the following described assets and properties of Reliance Steel & Aluminum Company (herein called "Reliance"), upon and subject to the following:

1. Reliance will sell its following described assets to the undersigned (or his designee) for the indicated prices:

- (a) All of its inventories at a price equal to current replacement prices from the producers of said inventories from whom Reliance usually purchases the same, plus applicable freight, and based upon a physical count of such inventories. Inventory items of the size or specifications not normally purchased

from such producers (commonly known as "cut downs," and "drop offs" and "shorts") are to be priced at current market prices.

(b) All machinery and equipment, autos and trucks, and office furniture and fixtures at an aggregate price of \$300,000.

(c) Deferred assets at a price equal to the book value thereof.

(d) All catalogues, customers' lists, sales and purchase records, name, good-will and similar assets for \$3,000. [145]

2. Land and building located at 2600 East 26th Street, Vernon, California, shall be leased upon the following terms:

(a) Term of ten years.

(b) Gross rental of \$69,500 per year, payable monthly.

(c) Landlord to pay the City and County real estate taxes and the fire and extended insurance coverage. Tenant to maintain premises in clean condition and in good repair, ordinary wear and tear and damage by fire or the elements excepted, unless caused by the negligence of the tenant. Lessor shall pay for replacements and repairs made necessary by ordinary wear and tear and damage by the elements, except when caused by the negligence of the tenant. Tenant to pay any increase in City and County real estate taxes over the amount thereof for 1957.

(d) Tenant shall have the right at Tenant's cost to build additional bay to building, which bay shall

at expiration of the lease belong to Landlord, but said bay shall belong to Tenant during such time as lease shall be in effect. If Tenant builds such additional bay, then Tenant shall have the right to extend the lease for additional ten-year period at the same rental and upon same terms.

(e) Tenant has option to purchase land and building for total price of \$600,000 at any time during the first ten year period.

3. Reliance will obtain ten year extension of existing lease covering 37th Street property, including crane therein, the rental for the additional period beginning January 15, 1960, to be not more than \$25,000 per year. Such lease as extended will be either assigned to the undersigned (or his designee) or a sublease will be given to the undersigned or his designee. The undersigned shall pay the rental payable thereunder. [146]

4. Reliance will lease to the undersigned (or his designee) for a term of ten years its building and two cranes therein, located at 37th Street leased property, for a gross rental of \$7,200 per year, payable monthly. Tenant shall have option to purchase Reliance's building and two cranes therein at any time during the term of such lease for \$58,000.

5. Thomas J. Neilan will agree not to compete in the State of California for a period of five years.

6. The consummation of this sale and lease is to be conditioned upon all of the following:

(a) Approval by Kaiser Aluminum and Dow Chemical of this transaction, and their approval and agreement to continue present consignment and distributorship agreements with the undersigned or his designee.

(b) Complete physical inventory and audit by Kaiser Aluminum and Dow Chemical of consignment inventories.

(c) Physical count of purchased inventories and pricing thereof as provided in subparagraph 1(a).

(d) Present key personnel to enter into mutually satisfactory employment agreements with the purchaser.

If you find the within proposal acceptable, please indicate your acceptance on a copy hereof, and forthwith upon your acceptance a mutually agreeable contract and escrow shall be entered into (which escrow shall be entered into with the Security-First National Bank of Los Angeles, as Escrowee), covering the within transaction, and which will provide for the deposit by the purchaser of earnest money of \$250,000.

Very truly yours,

/s/ MYRON HOKIN.

The above proposal is approved and accepted subject to 1-page rider attached:

RELIANCE STEEL &
ALUMINUM COMPANY,

By /s/ T. J. NEILAN,

Its President and Chairman
of the Board.

/s/ THOMAS J. NEILAN,

Individually, as Principal Stockholder of Reliance
Steel & Aluminum Company. [147]

Rider—To Be Attached to and Become a Part of
Letter Offer of Mr. Myron Hokin Dated Sep-
tember 30, 1957.

Par. 1(a)—Page 1—“All of its inventories * * *”
shall include goods in transit.

Par. 1(b)—Page 1—After \$300,000.00 add: “plus
actual cost of any new equipment now on order and
received after Oct. 1, 1957”—Consisting of 1 truck
and miscellaneous shop equipment estimated not to
exceed \$10,000.00.

Par. 2—Page 2—should read: “Land and building
located at 2600 East 26th Street, Vernon, Califor-
nia, shall be leased upon the following general terms,
on a form of lease similar to the existing lease on the
premises on East 37th Street, per copy attached.”

Par. 2(c)—Strike: “Lessor shall pay for replace-
ments and repairs made necessary by ordinary wear
and tear and damage by the elements, except when
caused by the negligence of the tenant.”

Par. 2(d)—after “Landlord” in 4th line, substi-
tute “unless option to purchase is exercised under
Par. 2(e).

Par. 6—Page 3: (a) in second line strike “of this transaction”;

Par. 6—Page 3: (c) Add: “The formal ‘mutually agreeable contract’ shall contain an arbitration clause providing for arbitration of any dispute under the contract.”

The letter offer of September 30, 1957, and the terms in this rider shall be of no force or effect unless formally accepted and approved on or before October .., 1957, and a formal contract shall be executed by the parties on or before October .., 1957.

Before taking inventories as provided in Paragraphs 6(b) and 6(c) purchaser shall complete his negotiations under 6(a) and 6(d), a lease satisfactory to both parties as to form shall be drafted, and an extension of the lease on the 37th Street premises shall be obtained by seller.

Rider Approved: Oct. 2, 1957: (Attach to Letter offer 9/30/57).

RELIANCE STEEL &
ALUMINUM CO.

By /s/ THOMAS J. NEILAN.

/s/ MYRON HOKIN. [148]

EXHIBIT C

The Sands Hotel
3320 East Van Buren, Phoenix, Arizona

July 21, 1957.

Dear Mr. Meisner:

Confirming today's phone conversation. I promise to pay you fifty per cent (50%) of the selling commission that I will receive, providing that you are responsible for the consumation of the sale of Reliance Steel & Aluminum Co. of Los Angeles. Naturally, the sale has to be agreeable to the buyer & seller.

Yours truly,

/s/ JACK MOORE. [149]

[Second page of Exhibit C.]

The Sands Hotel
3320 East Van Buren, Phoenix, Arizona

It may be that you might be interested in selling this company for more than the asking price, in which case it could be arranged so that you would receive a two-thirds portion of all that is received over the asking price—this is not a firm commitment but just a thought—if and when you might be interested then we will come to an agreement.

[No signature.] [150]

EXHIBIT D

(Copy)

July 25, 1957.

Jack Moore, Esq.,
The Sands Hotel,
3320 East Van Buren,
Phoenix, Arizona.

Dear Mr. Moore:

I am in receipt of your letter of July 21st confirming our fee arrangement which is an equal division between us of the total commissions to be received from the Reliance Steel and Aluminum Company of Los Angeles upon the completion of a deal initiated and concluded by me.

Next week I am conferring with corporations who are interested in the acquisition of Reliance and you may be assured that the moment I reach a point where I feel that there is a genuine indication of effecting a mutually satisfactory deal you will be promptly notified. Meanwhile, I want to thank you for your co-operation in this matter.

Sincerely,

HHM.dvi

Air Mail [151]

EXHIBIT E

Reliance Steel & Aluminum Co.

Aluminum, Steel, Magnesium

2068 East 37th Street

Los Angeles 58, California

July 30th, 1957.

Mr. Harry H. Meisner,
Meisner & Meisner,
National Bank Building,
Detroit 26, Michigan.

Dear Mr. Meisner:

I have discussed our conversation with Mr. Neilan after returning last week, and he feels as I indicated that he would.

We do not wish to sign any agreement that would cause us to lose complete freedom of action on our own part. We have given Mr. Jack Moore the opportunity to locate an acceptable buyer for our business and have an informal agreement to pay him a fee commensurate with his efforts. We had felt that your reply to Mr. Moore was as a representative of a buyer. However, it appears that your interest is a duplication of Mr. Moore's.

If you should work out a mutual arrangement with Mr. Moore, naturally we would not object.

Very truly yours,

RELIANCE STEEL &
ALUMINUM CO.,

.....,
WILLIAM T. GIMBEL.

c.c. to Mr. Jack Moore, 500 No. Old Ranch Road,
Arcadia, California. [152]

EXHIBIT G

October 7th, 1957

Mr. Harry H. Meisner,
2231 National Bank Building,
Detroit 26, Michigan.

Dear Harry:

I finally succeeded in getting Jack Moore to agree to give up half of his commission on the Hokin deal, with the understanding that you were giving up half of your share. This took considerable persuasion, as Moore is not an easy man to accomplish anything of this nature with. Anyway, he agreed and now you can feel easy about things.

Thank you for advising me that Hokin and Bagenhols would be arriving here next Tuesday.

I have told Hiemenz to do all the preliminary work so that we can get down to business and work up a contract immediately.

I wish you would write me confirming your agreement to split your half of the commission so that I will have proper credentials to satisfy Moore.

I enjoyed your visit and must say that you are a very persuasive man, and I understand now why you have never lost a case and hope that good luck will always accompany you in your legal work as well as in life generally.

With best wishes, I am

Very truly yours,

.....,
THOMAS J. NEILAN.

TJN:BL

EXHIBIT H

Los Angeles, California
November 12, 1957

Mr. Harry H. Meisner,
Meisner & Meisner,
National Bank Building,
Detroit 26, Michigan.

Dear Harry:

We are still negotiating with Mr. Hokin and his attorneys. It looks like we will consummate the deal with him and in order to expedite things I should like to have you sign the enclosed letter ad-

dressed to me, so that we can go ahead and conclude things without being held up on account of arrangements between you and Jack Moore.

Kindly send me the original copy of the letter by return Air Mail.

I hope things are going along well with you.

Very truly yours,

/s/ T. J. NEILAN,

President, Reliance Steel
& Aluminum Co. [154]

EXHIBIT J

Detroit, Michigan
November 12, 1957

Mr. Thomas J. Neilan, President,
Reliance Steel & Aluminum Co.,
2068 East 37th Street,
Los Angeles 58, California.

Dear Mr. Neilan:

This will confirm our understanding that the commission of 5% on the first million dollars and 2½% on any amount above the first million dollars of the net purchase price received by your company through escrow for the inventory and certain other assets covered by the purchase and sale agreement with the H. W. G. Corporation, if and when

executed, has been reduced to one-half such amount. We are not concerned with any of the leases, subleases or options.

It is understood that my one-half of such reduced amount, as my share of the commission or brokerage, will be paid direct to me upon the conclusion of the escrow and that Mr. Moore will be paid by you direct for his share of the commission or brokerage.

Cordially yours,

.....,
HARRY MEISNER. [155]

EXHIBIT K

Meisner and Meisner
Attorneys and Counselors at Law
National Bank Building
Detroit 26, Michigan

Harry H. Meisner
Ivan I. Meisner
R. J. C. Dorsey
Albert R. Grever

November 18, 1957

Thomas J. Neilan, Esq.,
Reliance Steel & Aluminum Co.,
2068 East 37th Street,
Los Angeles 58, California

Dear Mr. Neilan:

Herewith enclosed is my signed statement of fees payable to me upon the closing date of the sale of Reliance assets to the H. W. G. Corporation.

You will doubtless remember when I voluntarily offered to cut my fee to one half in my endeavor to revive the deal you remarked with an evident expression of frankness that I should not be obliged to give up any part of my fee, but in the interest of promoting a harmonious relationship I thereupon suggested that my fee should be the round figure of \$30,000 in which you acquiesced.

You will therefore observe that the enclosure differs from the one you forwarded in that a slight change has been made in the last two lines of the first paragraph and a few words of the second paragraph to state clearly the fixed fee of \$30,000 payable to me upon the closing date.

You are fully aware of the untiring efforts I put forth and the considerable expense incurred in bringing you and Hokin to a mutual understanding; then, too, I have to share the fee with my own office associates. The fact is that I had earnestly figured on receiving the original fee which would have been about \$60,000. However, taking into consideration my voluntary reduction to the fixed fee of \$30,000, this is to advise you that upon the receipt of the amount of \$30,000 at the closing date it will constitute a complete payment and discharge

of you and your Company from any and all further liability whatever to me.

Meanwhile I do wish to record that all through our dealings you have been graciously considerate and I enjoyed very much working with you and I wish you good health and a full measure of happiness for long years to come.

(Enclosure)

Cordially,

/s/ HARRY H. MEISNER.

HHM.dvi-4

Air Mail [156]

EXHIBIT L

Detroit, Michigan

November 18, 1957

Mr. Thomas J. Neilan, President,
Reliance Steel & Aluminum Co.,
2068 East 37th Street,
Los Angeles 58, California.

Dear Mr. Neilan:

This will confirm our understanding that the commission of 5% on the first million dollars and 2½% on any amount above the first million dollars of the net purchase price received by your Company through escrow for the inventory and certain

other assets covered by the purchase and sale agreement with the H. W. G. Corporation, if and when executed, has been voluntarily reduced by me with your acquiescence to the fixed amount of \$30,000 (Thirty Thousand Dollars).

It is understood that such reduced amount of \$30,000 as my share of the commission or brokerage will be paid direct to me upon the closing date and that Mr. Moore will be paid by you direct for his share of the commission or brokerage.

Cordially yours,

/s/ HARRY H. MEISNER. [157]

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM T. GIMBEL IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT

State of California,
County of Los Angeles—ss.

I, William T. Gimbel, being first duly sworn, depose and say:

I am a citizen of the United States, of lawful age, and reside at 740 Chaucer Road, San Marino, California.

At all times herein mentioned I was, and now am, an officer of Reliance Steel & Aluminum Co., a Corporation, one of the defendants in the action above

entitled and hereafter called "Reliance Steel." [158]

I am acquainted with Harry H. Meisner, the plaintiff above named. I first met plaintiff in his office in Detroit, Michigan, about July 20, 1957. On that occasion, plaintiff stated to me that he represented a principal who might be interested in purchasing the business and assets of Reliance Steel. Plaintiff asked me to sign an instrument which would protect him as the broker on the deal. I told him I would not sign any such instrument because Reliance Steel had an informal arrangement with Jack Moore whereunder Moore was to receive a commission if he negotiated a sale of Reliance Steel's business and assets. I also told plaintiff that the arrangement with Moore was not exclusive and we were working with other brokers and directly with prospective buyers. I further stated that, if plaintiff could arrange with Moore to split the sales commission in some manner, that would be a matter between the two of them. A few days later, after I had returned from Detroit to Los Angeles, I received a telephone call from plaintiff in which he stated, in substance, that he and Moore had agreed on a commission split and that the name of the plaintiff's principal was Hokin. He also stated that arrangements would be made for Hokin's partner, Mr. Charles Weiner, to come to Los Angeles to look over the plant and operations of Reliance Steel.

During the month of August, 1957, Hokin and

representatives of Hokin and plaintiff came to Los Angeles for the purpose of negotiating a purchase by Hokin and his associates of the business and assets of Reliance Steel. I participated in those negotiations. Hokin withdrew from the negotiations about August 27th, stating that, in his opinion, the price asked for the business and assets of Reliance Steel was too high.

In the latter part of September, 1957, plaintiff telephoned [159] me on several occasions, stating that his purpose was to get Reliance Steel and Hokin together on a deal. He stated that, if Reliance Steel would reduce its price, he would reduce his share of the sales commission by 50%. In a subsequent conversation he stated that Moore had agreed to do likewise. In a later telephone conversation, plaintiff stated that he had a new proposal from Hokin and asked me if he could bring it to Los Angeles. I requested him to tell us what the new proposal was or to submit it by mail. Plaintiff stated he would not do that because the proposal required his personal explanations. After these telephone conversations and about the end of September, 1957, plaintiff arrived in Los Angeles and brought with him a proposal from Hokin dated September 30, 1957.

I saw plaintiff about October 2, 1957, in the home of Mr. Neilan located at 433 South Arden Boulevard, Los Angeles, California. On that occasion, Neilan, plaintiff and I being present, Neilan stated in substance that he and plaintiff had had a con-

ference the preceding evening in Neilan's home and that plaintiff had persuaded him (Neilan) that a sale on the general terms outlined in the Hokin September 30 proposal as modified by a rider dated October 2, 1957, which he and plaintiff had negotiated, should be agreeable to Reliance Steel provided that the parties could work out a mutually satisfactory contract of sale and meet the other conditions set forth in the proposal and rider; that he had found plaintiff to be one of the most persuasive men he had ever met; that plaintiff was to take the October 2 rider to Chicago for the purpose of having it signed by Hokin and returned.

/s/ WILLIAM F. GIMBEL.

Subscribed and sworn to before me this 28th day of November, 1958.

[Seal] /s/ JEAN F. BROWN,
Notary Public in and for
Said County and State.

My Commission Expires May 28, 1961.

[Endorsed]: Filed December 1, 1958. [160]

[Title of District Court and Cause.]

PLAINTIFF'S MEMORANDUM BRIEF

Concise Statement of Facts

Counsel for Defendants has prepared an excellent concise statement of facts, about most of which

there is no dispute. Plaintiff therefore adopts paragraphs 1 to 7, inclusive, and 10, 11 and 13 of Defendants' concise statement of material facts. Paragraph 14 would likewise be acceptable if we delete the word conditional from 14a because said instrument is in writing and speaks for itself, and the same must be said for the instruments mentioned in paragraph 17. Paragraph 15 in general is accepted except where it imputes motives or an intent to represent Hokin. As to paragraph 16, Plaintiff has insufficient information to join therein. As to paragraph 8, Mr. Gimbel came to Detroit, apparently at Moore's suggestion, and Mr. Meisner was not previously informed of his identity. As to paragraph 9, Plaintiff cannot [166] accept Mr. Gimbel's version of the discussion. (See paragraph 4 herein.) As to paragraph 12, Defendants perhaps inadvertently mistake Mr. Hokin's unwillingness as an inability to pay \$3,750,000. Plaintiff is informed that Mr. Hokin is well able to raise such sum. Plaintiff therefore offers the following statement of facts:

* * *

4. On or about July 20, 1957, Mr. Gimbel, acting on information furnished by Moore, came to Mr. Meisner's office at Detroit, Michigan, bringing with him an eleven-year statistical analysis of Reliance's operations, of which an exact copy is attached [167] hereto, and the first discussion was had regarding the making of a deal, resulting in Plaintiff's employment. Gimbel was and is an executive and President of that Company. [168]

* * *

Dated this 2nd day of December, 1958.

/s/ HARRY H. MEISNER,
Plaintiff, Appearing in Pro-
pria Persona.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 4, 1958.

[Title of District Court and Cause.]

PLAINTIFF'S ANSWER TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

(N.B. This matter is now on the Docket for Pretrial Conference and both parties have filed extensive Briefs and analyses of facts in the case. Therefore, Plaintiff in this Answer to the Motion for Summary Judgment has not duplicated the Brief filed for Plaintiff in this cause but has only included citations on particular points involved in the Motion and Answer.)

In this case there are a number of issues, some of which are issues of law and some are issues of fact. In this Answer we will submit the testimony establishing that Defendants employed the Plaintiff to find a buyer ready, willing and able to purchase, (2.) that Plaintiff produced such a buyer, (3.) that after the buyer was found and an agreement signed Defendants refused to carry out the proposed sale. In addition Plaintiff will at the trial submit the testimony of the purchaser that he was ready, will-

ing and able to purchase but that the Defendants refused to [181] carry out the agreement. Consequently that Plaintiff is not required to show an actual sale since such a condition is waived by Defendants' refusal. In this case, having presented evidence in support of the material points in the case, Defendants' Motion for Summary Judgment should not be sustained because all of the material facts are either admitted by the Defendants or are supported by competent testimony raising issues of fact.

Defendants' Motion for Summary Judgment brings into sharp focus the issues involved in this case and the burden of proving each particular issue.

The burden of proving a cause of action, the existence of a contract, performance or waiver of the conditions, and the amount of recovery are upon the Plaintiff.

On the other hand Defendants raise affirmative defenses of illegality, in other words that Plaintiff was required to have a real estate or business chance license in California which he did not, and that Plaintiff's claim is barred for failure to present the same in the manner prescribed by California law. Also the claim that Jack Moore is a necessary party in interest and not joined herein. On these defenses burden of proof is on Defendants.

Plaintiff's Complaint alleges:

1. Employment of Plaintiff and Jack Moore "to find a purchaser ready, willing and able to pur-

chase or acquire the assets of said (Defendant) Corporation on terms mutually agreeable”;

2. “That (Defendants) agreed to pay the Plaintiff and Jack Moore 5% of the first \$1,000,000 and 2½% of the remainder of the net purchase price on such sale”;

3. “That subsequently it was agreed that one-half of said commission should be paid directly to Plaintiff and the other half to Jack Moore”;

4. That Plaintiff “fully performed said agreement by finding [182] a purchaser ready, willing and able, etc.” namely Myron Hokin or his nominee for a price of approximately \$3,750,000;

5. “That the condition as to closing of such sale has been waived by Defendants’ refusal to complete the sale.”

Plaintiff Has Adduced Direct and Creditable Evidence of Points (1-3) Supra

Aside from the conferences and telephone conversations which will involve testimony of the various parties, Defendants are faced with written evidence of the existence and form of the commission agreement.

Mr. Gimbel, then an executive and now President of Reliance Steel, received and retained the copy of Meisner’s July 29, 1957, letter to Moore in which Meisner in consideration of 50% of the commission disclosed the names of prospective purchasers in-

cluding Myron Hokin, and stated his understanding that the

“commission will be 5% on the first million and 2½% of all in excess thereof.”

On July 30th, 1957, Gimbel wrote Meisner “We have given Mr. Jack Moore the opportunity to locate an acceptable buyer for our business and have an informal agreement to pay him a fee commensurate with his efforts.”

Thereafter Meisner had telephone conversations with Gimbel, August 2, 1957, in which Meisner’s fee was estimated at \$62,500 and September 7, 1957, in which Gimbel claimed Meisner’s fee would be only \$50,000.

There were other conversations between the parties resulting in an agreement to cut Meisner’s fee in half and make it [183] payable to him direct. Mr. Neilan wrote Meisner on October 7, 1957, asking Meisner to confirm his agreement to split his half of the commission.

Finally on November 12, 1957, Neilan wrote Meisner asking him to sign the enclosure also dated November 12th.

That enclosure, prepared for Meisner’s signature and addressed to Neilan as President of Reliance Steel, began

“This will confirm our understanding”

thus indicating prior negotiations and the reaching of an understanding,

continuing "that the commission of 5% on the first million dollars and 2½% on any amount above the first million"

thus recognizing the pre-existence of such a commission agreement.

The enclosure then provides for cutting the commission in half.

The final paragraph evidences the definite understanding that

"My one half * * * will be paid direct to me * * * and Mr. Moore will be paid by you direct for his share of the commission."

As we say, Mr. Neilan in the letter and enclosure evidences an intent to confirm

"Our understanding."

There Is an Issue of Fact Whether Plaintiff Found a Purchaser Ready, Willing and Able to Purchase on Terms Agreeable to Defendants

Among the prospective purchasers for Defendants' business the first one listed in the letter of July 29, 1957, [184] from Meisner to Jack Moore, of which the copy was sent to Mr. Gimbel, Myron Hokin is listed as the first prospect.

Later on August 15th, 1957, Neilan sent a proposal to sell and lease to Hokin or his designee in the letter made Exhibit "One" to Defendants' Responses to Plaintiff's First Request for Admissions.

In response to Plaintiff's Request No. 1, Defendants admitted they were willing to sell on the terms therein specified.

In response thereto, Hokin sent back the modified offer dated September 30, 1957, which with the acceptance and rider of October 2, 1957, became the agreement Exhibit "B" attached to Defendants' First Request for Admissions.

In response to Plaintiff's Request No. 4, Defendants have admitted they were willing to sell and lease on the terms of said Exhibit B, as well they must in view of their execution of such agreement.

In response to Plaintiff's request No. 6 that Defendants admit that Hokin and his designee, the H. W. G. Corporation, were ready, willing and able to perform said agreement "B," Defendants responded that they were unable to admit or deny same.

Plaintiff proposes in this case to establish by the testimony of Myron Hokin that in addition to entering into the agreement "Exhibit B" and making the \$250,000 deposit required thereby, he and the H. W. G. Corporation were in fact ready, willing and able to complete such purchase but that after Mr. Neilan's death Defendants were unwilling to go through with the deal.

Therefore, unless Defendants are now willing to admit such facts, an issue of fact exists which must be resolved by the taking of testimony at trial. [185]

Defendants by Their Refusal to Complete the Sale to a Ready, Willing and Able Purchaser, Have Waived the Condition That Plaintiff's Commission Was Payable Upon Closing of the Sale

As stated in the preceding section Plaintiff will establish by the testimony of Myron Hokin that after the parties had entered into the agreement for Sale and Lease (September 30, 1957, and Rider October 2, 1957), which Defendants have admitted contained terms satisfactory to them, that he and H. W. G. Corporation made the \$250,000 deposit and were ready, willing and able to purchase but that Defendants would not go through with the deal.

Defendants now assert as a defense to this action the claim that the sale was never carried out.

But it is well established that a party to a contract cannot urge his own refusal to perform or permit the performance of a condition as a defense.

Richardson vs. Walter Land Co. (2d DCA, Cal., 1953), 258 Pac. (2d) 42;

Taylor vs. Simi Const. Co., 23 Cal. App., 308, 137 Pac. 1095;

Greenberg vs. Sakwinski, 211 Mich. 498, 179 NW 234;

Hayes vs. Beyer, 284 Mich. 60, 278 NW 764.

As to such facts—either Defendants must now withdraw their statement of inability to admit or deny Hokin's willingness to perform or an issue of fact exists in relation thereto which must be tried.

No License is Required by the California Statutes
to Find a Purchaser Ready, Willing and Able
to Purchase

Defendants have urged the affirmative defense that Plaintiff admits he has no real estate or business chance license. [186]

The facts are that Plaintiff is a Michigan attorney, that he had a Chicago contact interested in buying a steel mill, and that Mr. Gimbel, Defendants' officer, came to Mr. Meisner's office at Detroit to broach the sale. Under these circumstances it would seem that the application of California statutes might be questioned.

But Plaintiff need not go so far, since the California statutes do not prohibit agreements merely to find a purchaser.

In his Complaint Plaintiff claims a commission for finding a purchaser ready, willing and able. Neither the California real estate or business opportunity statutes require a license therefor:

Crofoot vs. Spivak, 113 Cal. App. (2) 146,
248 Pac. (2) 45;

Shaffer vs. Beinhorn (Cal. Sup. Ct. 1923),
190 Cal. 569, 213 Pac. 960;

Palmer vs. Wahler (3rd DCA Cal. 1955),
285 Pac. (2) 9.

The crux of earning such a commission is knowing or finding such a buyer. Where a corporation such as Reliance has its own brokers, negotiators and attorneys, a premature disclosure might be fatal. That

such was the service to be performed is substantiated by the Defendants' statement in the 9th paragraph (page 3) of their Concise Statement of Facts in the Memorandum filed for the pretrial conference that:

"9. On July 20, 1957, Gimbel visited Plaintiff—visited in Plaintiff's law offices in Detroit. Plaintiff refused to divulge his client's identity without first obtaining Reliance Steel's written commitment that he, Plaintiff would be entitled to a broker's commission in the event of consummation of a sale of the business * * *" [187]

The substance of Plaintiff's employment being the finding or disclosing of a purchaser, is not within the statutes.

It should be noted that in connection with the proposed sale, Defendants had reserved their own freedom of action, had other brokers and their own staff of negotiators and attorneys, as indicated by the many Exhibits submitted by Defendants.

Does Plaintiff Have a Separate Cause of Action Without Jack Moore

It is Plaintiff's understanding that in addition to this suit, Jack Moore has instituted a separate action for his commissions in the California Courts to which Defendants but not Plaintiff are parties.

Defendants allege in this action that Moore is an indispensable party to this action. The facts show otherwise.

From the first Defendants insisted on their own complete freedom of action. In the letter from Gimbel to Meisner, July 30, 1957, Mr. Gimbel said

“We do not wish to sign any agreement that would cause us to lose complete freedom of action on our part.”

Defendants then had other brokers and also prospects for direct sales and did not wish to be tied down.

Later the parties discussed the direct payment of Meisner's share to Meisner. This was discussed in August 2, 1957, and September 7, 1957, phone calls between Gimbel and Meisner.

And while Defendants now object to a suit without Moore, they had no hesitancy in direct negotiations with Meisner or agreements with Meisner alone.

For instance, Mr. Neilan in the letters of October 7, 1957, and November 12, 1957, negotiated directly with Meisner regarding his commission without Moore. And to top it off Neilan in the [188] enclosure to Meisner November 12, 1957, recognizes the understanding that Meisner and Moore are to receive their respective commissions direct.

Plaintiff's action is predicated on this separation of the fee into two shares. (See Plaintiff's Complaint, page 2, Par. 5.)

It is submitted that Plaintiff's claim for his separate share of the fee is supported by substantial

evidence raising a question of fact for determination at the trial of this cause.

Was Presentation of the Claim to the State Appointed Executor Required as a Prerequisite to Action in the Federal Court

The Defendant executor contends that this action against the executor is barred for failure to present the claim to the executor for allowance or disallowance prior to suit in the Federal Court.

It is conceded, however, that the claim was presented prior to filing the amended complaint herein, and has been denied by the executor.

It is submitted that such defense is not valid because compliance with state requirements of presentation of claims in actions founded on diversity of citizenship is not a prerequisite to Federal jurisdiction. In this case diversity of citizenship between the parties and consequent jurisdiction is not disputed in the motion for summary judgment.

Likewise, California law permits a suit after denial of claim, and it is submitted that the amendment of the complaint and the executor's denial would satisfy the requirement for presentation in the state court.

That such compliance with the state law is not required: [189]

In *Clark vs. Bever*, 139 US 96, the United States Supreme Court said (103)

The controverted question of debt or no debt, is one which, if the representative of the decedent is a citizen of a State different from that of the other party, the party properly situated has a right given by the Constitution of the United States to have tried originally or by removal, in a Court of the United States, which cannot be defeated by state statutes enacted for the more convenient settlement of estates of decedents.

See also *Hess vs. Reynolds*, 113 US 73.

It is therefore submitted that Defendants' Motion for Summary Judgment should be denied for the foregoing reasons as verified in Plaintiff's Affidavit of Merits and in Opposition to Defendants' Motion for Summary Judgment attached.

Dated this 17th day of December, 1958.

/s/ HARRY H. MEISNER,
Plaintiff, Appearing in Pro-
pria Persona. [190]

[Title of District Court and Cause.]

AFFIDAVIT OF MERITS AND IN OPPOSITION
TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

State of Michigan,
County of Wayne—ss.

Harry H. Meisner, being duly sworn, deposes and says that he is the Plaintiff in the above-entitled

cause and appearing in Propria Persona and that the matters set forth in the foregoing Answer to Defendants' Motion for Summary Judgment are true of his own knowledge except such as are stated upon information and belief and as to such matters he believes the same to be true and that such matters are incorporated in this Affidavit by reference as though repeated fully herein; and Deponent further says that he believes that he has a good and meritorious cause of action in this cause and that Defendants' Motion for Summary Judgment is not well founded for the reasons stated in said Answer to the Motion for Summary Judgment.

/s/ HARRY H. MEISNER.

Subscribed and sworn to before me this 17th day of December, 1958.

/s/ DOLORES V. IVERSON,

Notary Public, Oakland County, Michigan (Acting
in Wayne County, Michigan).

My commission expires October 26th, 1962.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 19, 1958. [191]

In the United States District Court, for the
Southern District of California, Central Division

Civil No. 525-58-WM

HARRY H. MEISNER,

Plaintiff,

vs.

RELIANCE STEEL & ALUMINUM CO., a California Corporation, and SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a National Banking Association, Executor of the Estate of Thomas J. Neilan, Deceased,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND SUMMARY JUDGMENT

The motion for summary judgment of defendants Reliance Steel & Aluminum Co. and Security-First National Bank, as Executor of the Will of Thomas J. Neilan, deceased, pursuant to Rule 56 of the Federal Rules of Civil Procedure, having come on regularly for hearing on the 8th day of December, 1958, before the above-entitled court, the Honorable William C. Mathes, Judge Presiding, notice of such hearing having been duly given, plaintiff appearing in propria persona and Messrs. Lawler, Felix & Hall, William T. Coffin, Esq., and Robert Henigson, Esq., appearing for said defendants, and the court being fully advised and having determined as a matter of law that defendants and each of them [194]

are entitled to a summary judgment, the court makes its findings of fact, conclusions of law and judgment as follows:

Findings of Fact

1. Jurisdiction of the court is founded upon diversity of citizenship and an amount in controversy which exceeds, exclusive of interest and costs, the sum of \$3,000.00.

2. Plaintiff is a citizen of the State of Michigan.

3. Defendant Reliance Steel & Aluminum Co. (hereinafter called "Reliance Steel") is a corporation organized and existing under the laws of the State of California.

4. Defendant Security-First National Bank (hereafter called the "Bank") is a national banking association organized and existing under the laws of the United States of America, having its principal place of business in the State of California. The Bank is sued in its capacity as Executor of the Will of Thomas J. Neilan (hereinafter called "Neilan") who died November 17, 1957. In his lifetime, Neilan was the president and one of the directors, and indirectly controlled a majority of the shares of the issued and outstanding capital stock, of Reliance Steel. The Bank is the duly appointed, qualified and acting Executor of Neilan's Will in probate proceedings now pending in the Superior Court of the State of California in and for the County of Los Angeles (L. A. Superior Court No. 397,909).

5. There is no genuine issue as to any material fact to be tried or determined herein.

6. Plaintiff was not a party to any contract of employment relative to the sale of the assets or the capital stock of Reliance Steel to which Reliance Steel and Neilan, or either of them, were [195] parties.

7. If any contract of employment relative to the sale of the assets or the capital stock of Reliance Steel existed to which Reliance Steel and Neilan, or either of them, were parties, payment of compensation thereunder was contingent upon the consummation of a sale.

8. No sale of the assets or the capital stock of Reliance Steel was consummated and no valid and enforceable contract relative to such sale was made.

9. Plaintiff actively participated in the negotiations conducted within the State of California relative to a contract for the sale of the assets or the capital stock of Reliance Steel.

10. Plaintiff was not at any time while actively engaged within the State of California in such negotiations licensed as a business opportunity broker or salesman or as a real estate broker or salesman by the Real Estate Commissioner of the State of California.

11. Plaintiff failed to file a creditor's claim against Neilan's estate with the clerk of the court in which the proceedings relative to such estate were

pending and failed to present such creditor's claim to the Bank, as such Executor, prior to the commencement of this action.

Conclusions of Law

1. There was no contract between Reliance Steel and Neilan, or either of them, on the one hand, and plaintiff, on the other.

2. No valid and enforceable contract of purchase and sale covering the assets or the capital stock of Reliance Steel was ever made. [196]

3. No actionable claim in favor of plaintiff existed against the Bank, as such Executor, prior to the commencement of this action.

Summary Judgment

It Is Therefore Ordered, Adjudged and Decreed that the motion for summary judgment of defendants be and the same hereby is granted, that plaintiff have and recover nothing by his amended complaint, and that the action be dismissed, each party to bear own costs. [Fed. R. Cir. P. 54 (d).]

Dated this 29th day of December, 1958.

/s/ WM. C. MATHES,

Judge of the United States
District Court.

Lodged December 1, 1958.

[Endorsed]: Filed and entered December 31, 1958. [197]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Harry H. Meisner, Plaintiff and Appellant, hereby appears to the United States Court of Appeals for the Ninth Circuit from the Summary Judgment entered in this cause on December 31, 1958, by the Honorable William C. Mathes, District Judge.

Dated this 19th day of January, 1959.

/s/ HARRY H. MEISNER,
Plaintiff and Appellant, Ap-
pearing in Propria Persona.

[Endorsed]: Filed January 20, 1959. [198]

[Title of District Court and Cause.]

SPECIFICATION OF POINTS, ETC.

Plaintiff and Appellant hereby specifies the following points, assignments of error and reasons and grounds for Appeal herein:

That the Court erred in granting Defendants' Motion for Summary Judgment contrary to Plaintiff's Affidavit of Merits, Answer to said Motion; proffer of evidence on all material points and the admissions contained in Defendants' Responses to Plaintiff's First Request for Admissions and for the following reasons:

A. That the Court erred in its finding of fact No. 5, that there were no genuine issues of fact to be tried, and in its findings of fact 6, 8, 9 and 10 because Plaintiff adduced substantial evidence:

6. That Defendants entered into a contract to pay Plaintiff a commission for finding a purchaser ready, willing and able to purchase the assets or capital stock of Reliance Steel, although as stated in finding No. 7 such payment was conditioned upon the consummation of such sale.

8. That although the sale was never consummated, [200] Plaintiff found a purchaser ready, willing and able to purchase such assets on terms satisfactory to Defendant; that a written agreement was entered into between Defendants and such purchaser, and the purchaser made a deposit of Two Hundred and Fifty Thousand Dollars (\$250,000); but that Defendants, after the death of Mr. Neilan, refused to complete the sale, although the purchaser was ready, willing and able to consummate the sale.

9. & 10. That Plaintiff's employment was not for the purpose of negotiating a sale, but merely for the purpose of finding a purchaser.

B. That the Court erred in its conclusions of law as follows:

1. & 2. For the reasons stated in Paragraphs A6 and A8 above.

3. Because the State of California requires no license for the purpose of finding a purchaser for

real estate or assets, and Plaintiff's activities herein were lawful without license.

4. Because no presentation of claim in a State Court was required as a condition precedent to action in the United States District Court based on diversity of citizenship, and a state law cannot deny such right of action.

C. Because there was substantial evidence in support of Plaintiff's contention that Defendants, by their refusal to complete the sale, waived the requirement that a sale should be consummated as a condition to liability for the fee.

D. Because Plaintiff was supported in each of the issues of fact and law by credible evidence or admissions of the Defendant, and because Plaintiff as a matter of law would be entitled [201] to recover in this action if the trial Court upon hearing the evidence should believe same and make findings of fact for Plaintiff.

/s/ HARRY H. MEISNER,
Plaintiff and Appellant, Ap-
pearing in Propria Persona.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 20, 1959. [202]

[Title of District Court and Cause.]

DOCKET ENTRIES

6/2/58—Fld. compl. for Breach Contract. Issued
Sums Made JS-5.

12/31/58—Fld. defts. proposed Finds. of Fact,
Concls. of Law and mot. for Summary Judgmt. &
Ord. thereon grant summary judgment., pltf. to
take nothing by his amended complt. dismiss this
action & each party to bear own costs, etc.

(Ent. 12/31/58, & not. attys.) JS-6.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled
Court, hereby certify that the items listed below
constitute the transcript of record on appeal to the
United States Court of Appeals for the Ninth Cir-
cuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 208, in-
clusive, containing the original:

Complaint, filed 6/2/58.

Amended Complaint, filed 7/2/58.

Answer of Defendant Reliance Steel & Aluminum
Co., to Plaintiff's Amended Complaint, filed 7/7/58.

Answer of Defendant Security-First National
Bank, etc., to Plaintiff's Amended Complaint, filed
7/7/58.

Interrogatories by Defendant Reliance Steel &
Aluminum Co. to Plaintiff, filed 7/3/58.

Plaintiff's Answers to Interrogatories of Reliance Steel & Aluminum Co., filed 7/11/58.

Reliance Steel & Aluminum Co. First Request for Admissions, filed 8/5/58.

Plaintiff's Admission in response to Defendants' First Request for Admissions, filed 8/20/58.

Reliance Steel & Aluminum Co. Second Request for Admissions, filed 8/29/58.

Reliance Steel & Aluminum Co. Second Interrogatories, filed 8/29/58.

Plaintiff's Admission pursuant to Defendants' Second Request, filed 11/3/58.

Plaintiff's Answers to Second Interrogatories, filed 11/3/58.

Defendants' responses to Plaintiff's First Request for Admissions, filed 11/10/58.

Defendants Memorandum of Contentions of Fact and Law, filed 11/19/58.

Defendants' Notice of Motion for Summary Judgment, filed 12/1/58, with supporting Affidavit Wm. T. Gimbel, etc.

Plaintiff's Memorandum Brief (Concise Statement of Facts), filed 12/4/58.

Plaintiff's Answer to Defendants' Motion for Summary Judgment with Affidavit of Merits and in opposition to Defendants' Motion for Summary Judgment, filed 12/19/58.

Findings of Fact, Conclusions of Law and Summary Judgment, entered 12/31/58.

Notice of Appeal.

Specification of Record and Specification of Points, etc.

Designation of Additional Portions of Record on Appeal.

B. Copy of Docket Entries.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60 has been paid by appellant.

Dated: February 3, 1959.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16358. United States Court of Appeals for the Ninth Circuit. Harry H. Meisner, Appellant, vs. Reliance Steel & Aluminum Co., a Corporation and Security-First National Bank of Los Angeles, Executor of the Estate of Thomas J. Neilan, Deceased, Appellee. Transcript of Record. Appeal From the United States District Court for the Southern District of California, Central Division.

Filed: February 4, 1959.

Docketed: February 11, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 16,358

IN THE
**United States Court of Appeals
for the Ninth Circuit**

HARRY H. MEISNER,
Appellant,
vs.

RELIANCE STEEL & ALUMINUM CO.,
a Corporation, and
SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,
Executor of the Estate of Thomas J. Neilan, Deceased,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION

BRIEF FOR APPELLANT

HARRY H. MEISNER
Plaintiff and Appellant, appearing
in Propria Persona,
2233 National Bank Building,
Detroit 26, Michigan.

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IN THE
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No. 16,358

HARRY H. MEISNER,
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vs.

RELIANCE STEEL & ALUMINUM CO.,
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Executor of the Estate of Thomas J. Neilan, Deceased,
Appellee

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION**

BRIEF FOR APPELLANT

STATEMENT AS TO JURISDICTION

The facts sustaining jurisdiction of the District Court are set forth in Paragraph 1, Count 1, of plaintiff's Amended Complaint (R. 7). Jurisdiction is based on Diversity of Citizenship, Plaintiff being a citizen and resi-

dent of the State of Michigan, and the Defendants being a corporation incorporated under the laws of the State of California and a National Banking Association with offices and principal places of business within said district; and also upon the amount at issue which exceeds the sum of three thousand dollars, exclusive of interest and costs (R. 113). (Note: this action was commenced prior to the amendment increasing jurisdictional amount.) The amount claimed in the *ad damnum* clause, \$75,000 (R. 10) is in excess of the jurisdictional amount. The District Court had jurisdiction under U. S. C. Tit. 28 Sec. 1332.

Jurisdiction of the Court of Appeals on appeal from the judgment, of the District Court, is established by U. S. C. Tit. 28 Sec. 1291.

STATEMENT OF QUESTIONS INVOLVED

Plaintiff and Appellant's specification of points, assignments of error and reasons and grounds for appeal are set forth at length in the printed record pages 116-8 and are adopted herein. Plaintiff has argued the following propositions:

- I. SUMMARY JUDGMENT MAY NOT BE GRANTED IF TRIABLE ISSUES OF FACT ARE PRESENTED, AND THE BURDEN IS UPON THE MOVING PARTY TO ESTABLISH THAT NO SUCH ISSUES EXIST.
- II. PLAINTIFF ADDUCED OR OFFERED CREDIBLE TESTIMONY ON EACH MATERIAL POINT IN SUPPORT OF HIS COMPLAINT, THEREBY RAISING ISSUES OF FACT WHICH COULD NOT BE DISPOSED OF BY MOTION FOR SUMMARY JUDGMENT.
- III. DEFENDANTS BY THEIR REFUSAL TO COMPLETE THE SALE TO A READY, WILLING AND ABLE PURCHASER, HAVE WAIVED THE CONDITION THAT PLAINTIFF'S

COMMISSION WAS PAYABLE UPON CLOSING OF A SALE.

IV. PLAINTIFF WAS NOT REQUIRED TO HAVE A REAL ESTATE BROKER'S OR BUSINESS OPPORTUNITY BROKER'S LICENSE TO ENTITLE HIM TO EARN A COMMISSION FOR FINDING A PURCHASER FOR DEFENDANT'S BUSINESS.

V. NO PRESENTATION OF CLAIM TO THE STATE APPOINTED EXECUTOR WAS REQUIRED AS A PRE-REQUISITE TO ACTION IN THE FEDERAL COURT BASED ON DIVERSITY OF CITIZENSHIP.

STATEMENT OF FACTS AND PROCEEDINGS

This is an action by the plaintiff Meisner, a citizen and resident of Michigan, against two California defendants, to recover upon an alleged commission agreement for finding a purchaser ready, willing and able to purchase or acquire the assets of Reliance Steel & Aluminum Co. or the capital stock thereof on terms mutually agreeable, (Amended Complaint, Pars. 4 and 5, R. 7 and 8). Such commission was payable at the completion of sale.

The defendants are Reliance Steel & Aluminum Co., herein called "Reliance", and Security-First National Bank of Los Angeles as Executor of Thomas J. Neilan, during his lifetime the principal stockholder of Reliance, and a party to the alleged agreement (R. 7 and 8).

It is plaintiff's contention that he found such a purchaser namely Myron Hokin, individually and as agent for H. W. & G. Corporation, on terms mutually acceptable; that an agreement (Exhibit B, R. 79-84) was entered into covering such sale; that the purchaser made a deposit of \$250,000 (Exhibit A, R. 78) and was ready to perform

on his part, but that defendants then refused to go through with the sale. That defendants thereby waived and are estopped to assert the condition requiring consummation of the sale.

In response to requests for admissions, defendants admitted (Response No. 4, R. 45) that Reliance was willing to sell and lease on the terms of Exhibit B, and that Neilan was willing that Reliance make such sale. Also (Response No. 5, R. 45-6) that Neilan's signatures to the instrument were genuine, and that he was duly authorized to execute same.

As to the question (Request No. 6, R. 46) whether Hokin and H. W. & G. Corporation were ready, willing and able to perform Exhibit B, defendants did not admit, but also did not deny same, for claimed want of knowledge.

In the beginning Reliance had a commission agreement with one Jack Moore for the sale of its assets.

On July 20, 1957, Mr. Gimbel, then an officer and now President of Reliance, visited Mr. Meisner's office at Detroit. There are conflicting statements as to what occurred. Meisner states in his affidavit that he refused to divulge the purchasers' identity without a written commitment that he would receive a commission in the event of a sale (R. 107). This conversation is referred to in Mr. Gimbel's letter of July 30, 1957 (R. 87).

In the meantime, Moore and Meisner reached an agreement for equal division of the fees in Exhibits C (R. 85) and D (R. 86).

Thereafter, there was discussion and correspondence between the parties regarding the commissions.

Finally, after the purchase agreement had been signed on October 2, 1957 (Exhibit B, R. 79-84) Mr. Neilan,

President of Reliance, wrote Meisner (Exhibit G, R. 89) asking "I wish you would write me confirming your agreement to split your half of the commission".

And again on November 12, 1957 (Exhibit H, R. 89) Neilan wrote Meisner asking him to sign the enclosure (Exhibit J, R. 90) and return same to him by return Air Mail. Exhibit J, (R. 90) is the letter prepared for Meisner's signature by Neilan. In it, he refers to "Our understanding" that the commission of 5% of first million and 2½%" (on excess)—"has been reduced to one half such amount". Also that "It is understood that my one-half of such reduced amount, as my share of the commission or brokerage, will be paid to me direct—".

Meisner did not sign Exhibit J but instead prepared Exhibit L (R. 93) which is substantially the same as Exhibit J, but specifies the amount of the fee (\$30,000). This letter was mailed November 18, 1957.

Unfortunately, Mr. Neilan died on November 18, 1957 and his successors have been unwilling to complete the sale. They have likewise refused to pay Meisner's commission.

There is no dispute that the original employment was contingent upon consummation of the sale.

However it is plaintiff's position, which will be supported at the trial by the testimony of the purchaser, Hokin, that purchaser was ready, willing and able to complete the purchase agreement, Exhibit B (R. 78-84) but that Reliance refused to do so after Neilan's death. It is plaintiff's contention, defendants thereby waived performance of the condition as to completion of sale, and are estopped from raising a failure of performance which results from their own refusal.

In their respective answers, the defendants made a general denial, and pleaded as special affirmative defenses that plaintiff had failed to join a necessary party (Moore), (not covered in the court findings) that plaintiff could not recover because he had no real estate or business chance license, and, although an attorney in Michigan, was not admitted to practice in California, rendering his services illegal.

In addition the executor pleaded an additional defense that the claim was not filed with the executor in the manner provided by the California laws (R. 11-14; 14-18).

Demands for admissions were made by both parties, and plaintiff submitted to interrogatories by defendants.

Thereafter defendants made motion for summary judgment (R. 60).

Despite plaintiff's verified answer to such motion (R. 99-111) wherein it was pointed out that plaintiff had adduced Direct and Credible Evidence upon all material points, the Court below granted such motion, adopting as reasons defendants' proposed findings of Fact and Conclusions of Law (R. 112).

Plaintiff on appeal has specified the points, assignments of Error and Reasons and Grounds for Appeal appearing in the Record (116-8).

ARGUMENT

I. SUMMARY JUDGMENT MAY NOT BE GRANTED IF TRIABLE ISSUES OF FACT ARE PRESENTED, AND THE BURDEN IS UPON THE MOVING PARTY TO ESTABLISH THAT NO SUCH ISSUES EXIST.

As will be established in the argument under part II of this brief (page 8), plaintiff adduced credible testimony on each material point in support of his complaint, thereby raising issues of fact which could not be disposed of by motion for summary judgment.

This Court has heretofore ruled in *Byrnes v. Mutual Life Insurance Co. of N. Y.* (C. C. A. 9, 1954) 217 F. 2d 497 that:

“The movant for summary judgment has burden of showing there is no triable issue of fact presented”.

See also:

Pickle v. Trimmell (Pa. 1950) 93 F. S. 823;
Jensen v. Macartney (D. Minn. 1951) 95 F. S. 598;
Caylor v. Verden (C. C. A. 8 1955) 217 F. 2d 739;
SMS Mfg. Co. Inc. v. U. S. Mengel Plywoods, Inc. (C. C. A. 10 1955) 219 F. 2d 606.

In the Caylor case, the Court said that all doubts are resolved in favor of the opposite party.

This Court has likewise held in the case of *Guerrero v. American Hawaiian Steamship Co.* (C. C. A. 9 1955), 222 F. 2d 238 that:

“Summary judgment may not be granted where moving papers and affidavits indicate a substantial dispute of material facts.”

Same: *Lane Bryant Inc. v. Maternity Lane* (C. C. A. 9 1949) 173 F. 2d 559.

The Court below not only made no finding on the important issues of Waiver and Estoppel, but defendants had stated their inability to admit or deny the facts essential thereto, Response No. 6, R. 46. As shown in the next section, plaintiff presented credible evidence on all issues.

It is respectfully submitted that the Court below erred in granting defendant's motion for summary judgment.

II. THAT PLAINTIFF ADDUCED OR OFFERED CREDIBLE TESTIMONY ON EACH MATERIAL POINT IN SUPPORT OF HIS COMPLAINT, THEREBY RAISING ISSUES OF FACT WHICH COULD NOT BE DISPOSED OF BY MOTION FOR SUMMARY JUDGMENT.

Aside from defendants' affirmative defenses of lack of broker's or other licenses, and failure to comply with California claim procedure, plaintiff's burden of proof as to the existence of a contract and its performance or waiver are fairly simple. These include the allegations:

- (A) That defendants employed plaintiff and one Jack Moore to:
 - a. find a purchaser ready, willing and able to purchase or acquire the assets or capital stock of defendant Reliance Steel & Aluminum Co.,
 - b. on terms mutually agreeable,

- c. for a commission of 5% on the first \$1,000,000 and 2½% of the remainder of the purchase price,
 - d. that such commission was to be payable on the completion of the sale.
- (B) That thereafter it was agreed that defendants would pay one-half of the commission direct to plaintiff and one-half to Jack Moore;
- (C) That plaintiff performed the contract on his part by finding a purchaser ready, willing and able to purchase, namely Myron Hokin and H. W. & G. Corporation, who entered into the agreement Exhibit B (R. 79-84) and made the deposit of \$250,000, Exhibit A (R. 78);
- (D) That defendants waived the condition that the sale be completed by their refusal to go through with the sale, although the purchaser was ready, willing and able to complete.

In support of these issues, plaintiff was prepared to introduce evidence at the trial, including defendants' admissions in the responses to plaintiff's first request for admissions (R. 42-7); the various exhibits introduced in this cause; the testimony of plaintiff, and the proposed testimony of Myron Hokin to the effect that he stood ready to complete the purchase, but that defendants refused to go through with the sale. This testimony would have sustained plaintiff on each of said issues as follows:

- A. The existence of the commission agreement is clearly evidenced by the letter, Exhibit H (R. 89) from Mr. Neilan as Reliance's president to plaintiff on November 12, 1957, and the enclosure Exhibit J (R. 90) which Mr. Neilan prepared for Meisner's signature and which contains the following language:

"This will conform our understanding that the commission of 5% on the first million dollars and 2½% on any amount above the first million dollars of the net purchase price * * * has been reduced to one-half such amount. * * *

"It is understood that my one-half of such reduced amount * * * will be paid direct to me upon conclusion of the escrow. * * *"

Substantially this same language appears in Meisner's letter of November 18, 1957, Exhibit L (R. 93).

Defendants have never denied that they originally had an arrangement with Moore for such a commission (See Ex. E, R. 87) or the agreement between plaintiff and Moore as to the splitting of such commission set forth in their proposed findings of fact No. 5 (R. 65).

We submit that the existence of this agreement to pay plaintiff a commission and to pay it direct is established by defendants' own writing, Exhibits H and J (R. 89-91).

- B. That plaintiff's half of the commission would be paid to him direct.

This understanding is likewise established by Exhibit J (R. 90-91) prepared by Mr. Neilan for plaintiff's signature and enclosed in the letter Exhibit H (R. 89).

In it Mr. Neilan asks Meisner to sign the statement that "it is understood that my one-half of such reduced amount * * * will be paid direct to me * * *".

C. That plaintiff performed his agreement by finding a purchaser ready, willing and able to purchase on terms mutually agreeable.

In performance of his agreement, plaintiff produced a purchaser, who it will be shown by evidence at the trial was ready, willing and able to purchase on terms mutually agreeable. (See verified answer to motion for summary judgment, R. 105.)

Thereafter defendants and said purchaser, Myron Hokin, acting individually and as agent for H. W. & G. Corporation, entered into the agreement Exhibit B (R. 79) with Rider (R. 83).

In response to plaintiff's request for admissions, defendants admitted in Response No. 4 (R. 45):

"That * * * defendant Reliance * * * was willing to sell and lease the property described in said Exhibit B * * * on the terms and subject to the conditions therein set forth * * *; further admit that Thomas J. Neilan was then willing that Reliance * * * sell * * * on such terms * * *".

In response to plaintiff's request No. 6 (R. 46) that defendants admit that Hokin and H. W. & G. Corporation were ready, willing and able to perform, defendants responded that they

"cannot truthfully admit or deny" etc. * * * "for the reason that defendants have no knowledge of the intent or financial ability of said Myron Hokin or said H. W. & G. Corporation" etc.

As against defendants' claimed lack of knowledge on this point, it is undisputed that Hokin made the \$250,000 deposit (see Exhibit A, R. 78) required by the sales agreement, Exhibit B (R. 82). Plaintiff in his sworn answer to defendants' Motion for Summary Judgment (R. 104) stated that he

“proposes in this case to establish by the testimony of Myron Hokin that * * * he and the H. W. & G. Corporation were in fact ready, willing and able to complete such purchase but that after Mr. Neilan's death defendants were unwilling to go through with the deal.”

D. That defendants waived the condition that a sale be completed by their refusal to go through with the sale although the purchaser was ready, willing and able to purchase.

In the sworn answer to the motion for summary judgment (R. 104) plaintiff stated that at the trial he would offer the testimony of Myron Hokin that the prospective purchasers remained ready willing and able to purchase but that after Mr. Neilan's death, defendants were unwilling to go through with the deal. In Argument III, page 13 of this brief, plaintiff will discuss the effect of such refusal as a waiver of the condition as to closing.

III. DEFENDANTS BY THEIR REFUSAL TO COMPLETE THE SALE TO A READY, WILLING AND ABLE PURCHASER, HAVE WAIVED THE CONDITION THAT PLAINTIFF'S COMMISSION WAS PAYABLE UPON CLOSING OF A SALE.

In his complaint, (Amended Complaint, Par. 6, R. 9), plaintiff did not claim that the sale on which his right to commission was contingent had actually been completed but instead claimed that although the purchasers, Hokin and his corporation, were ready, willing and able to complete the purchase agreement, Exhibit B (R. 79), that the defendants themselves refused to complete the sale, and that defendants are estopped to set up as a defense the non-performance of a condition resulting from their own refusal to go through with the sale.

In other words, that defendants had waived the condition of completion of the sale.

In this course, he was relying on the well recognized rule that a party to a contract cannot raise as a defense non-performance of a condition of which he has refused to permit performance. Whether plaintiff's employment originated in Michigan or California, this rule is the same. See:

Richardson v. Walter Land Co. (2d D. C. A., Cal., 1953), 258 Pac. (2d) 42;

Taylor v. Simi Const. Co., 23 Cal. App. 308, 137 Pac. 1095;

Greenberg v. Sakwinski, 211 Mich. 498, 179 N. W. 234;

Hayes v. Beyer, 284 Mich. 60, 278 N. W. 764.

In *Richardson v. Walter Land Co. supra*, plaintiff claimed a commission for finding defendant a loan. The

Court found that plaintiff produced a lender ready willing and able to make the loan on terms acceptable to the defendant corporation as borrower, and an escrow was opened and duly signed and executed by the borrower and lender to consummate the sale. However, defendant then refused to pledge the collateral required, and abandoned the transaction. Headnote 5 of that case reads as follows:

“Borrower which precluded by its own remissness the materialization of the loan could not take advantage of such act to defeat its liability for commission due the broker who procured lender on terms which the borrower had agreed upon”.

In the *Taylor* case, *supra*, defendant in consideration of certain services agreed to pay plaintiff \$1000 three days after water was turned on in defendant's water mains. However, defendant abandoned the project and never constructed the lines. Its defense was failure of the condition. In holding for plaintiff, the Court said:

“defendant having agreed to make payment within a stated time after the happening of an event, could not, by refusing to permit that event to occur, escape liability on its contract”.

The *Taylor* case is cited with approval in the Michigan case of *Hayes v. Beyer*, above. In that case, the first headnote reads as follows:

“Where a contract is performable on the occurrence of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event, particularly where it is dependent in whole or in part on his own act and where he prevents the fulfillment of a condition precedent or its performance by the adverse party, he cannot rely on such condition to defeat his liability.”

This situation is even more aptly covered by the following quotation from *Greenberg v. Sakwinski*, the Michigan case cited above.

“The claim that no commission was payable or owing until title passed and the sale was consummated, under the language of the contract that payment was to be ‘made at the time of settlement of the sale’ calls for no extended discussion. If plaintiff fully performed on his part and defendant’s malconduct rendered it impossible to make settlement of the sale according to the land contract he had signed, he is estopped from taking advantage of his own wrong.”

In his sworn answer to defendants’ motion for summary judgment, plaintiff stated that he proposed to establish by the testimony of Myron Hokin that Hokin and H. W. & G. Corporation, the purchasers, under Exhibit B, were ready, willing and able to complete the purchase but that after Mr. Neilan’s death, defendants were unwilling to go through with the deal.

As pointed out in the Argument Part I, on motion for summary judgment, the burden of proof is on the moving party, and well pleaded facts must be accepted.

Yet instead of submitting evidence defendants completely denied any knowledge on this subject. In response to plaintiff’s Request for Admission, defendants stated that they (No. 6, R. 46).

“cannot truthfully admit or deny that Myron Hokin * * * was ready, willing and able to purchase the property * * * for the reason that defendants have no knowledge of the intent or financial ability of said Myron Hokin * * *”.

We submit that the Court below was in error in its refusal to consider this question of waiver and estoppel, and in granting defendants' Motion for Summary Judgment without a trial of such issue.

IV. PLAINTIFF WAS NOT REQUIRED TO HAVE A REAL ESTATE BROKER'S OR BUSINESS OPPORTUNITY BROKER'S LICENSE TO ENTITLE HIM TO EARN A COMMISSION FOR FINDING A PURCHASER, READY, WILLING AND ABLE TO BUY DEFENDANTS' BUSINESS.

In his declaration, plaintiff alleged a commission agreement "to find a purchaser ready, willing and able to purchase or acquire the assets of said Corporation" (Amended Complaint, par. 4, R. 8).

In their respective answers and motion for summary judgment, the defendants raised an affirmative defense that for such activities, plaintiff was required to have a Real Estate Broker's or Business Chance Broker's License and that his admitted lack of either license rendered the commission agreement illegal.

But no such license is required under the California statutes for merely finding a purchaser of real estate or businesses.

Crofoot v. Spivak, 113 Cal. App. (2) 146, 248 Pac. (2) 45;

Shaffer v. Beinhorn (Cal. Sup. Ct. 1923), 190 Cal. 569, 213 Pac. 960;

Palmer v. Wahler (3rd D. C. A. Cal. 1955), 285 Pac. (2) 9.

In *Crofoot v. Spivak* above, the second headnote reads as follows:

“Plaintiff who agreed to introduce prospective buyers of sawmills and timber to defendant in return for \$2500 in even of sale to prospects was not a ‘real estate broker’ within statute licensing real estate brokers and prohibiting operations of those not properly licensed, and was entitled to fee though unlicensed”.

We believe this applies directly to the facts of this case.

In addition, the California Court said in *Palmer v. Waller* above (page 12):

“It therefore appears that the law in California as originally announced by our Supreme Court in *Heyn v. Phillips supra*, and followed in the *Shaffer* case is that a so-called ‘finder’s agreement’ falls neither within the purview of the statute of frauds, nor the real estate licensing act.”

The facts are that plaintiff is a Michigan attorney with offices at Detroit. That he had a prospect at Chicago, Illinois interested in buying a steel mill, and that the first contact between the parties was on July 20, 1957, when Mr. Gimbel, defendant’s present president, visited plaintiff’s office at Detroit, at which time plaintiff asked a commission and refused to divulge his client’s identity without a commitment that he would receive a commission in the event of consummation of a sale. (Plaintiff’s sworn answer to defendants’ motion, R. 106-7.)

It should also be noted that in connection with the proposed sale, defendants had reserved their own freedom of action (Exhibit E, R. 87) and had other brokers interested in the property (Gimbel Affidavit, R. 95). Also defendants had their own staff of negotiators and attorneys as indicated by the many exhibits submitted by defendants.

Under the California cases cited above, no license was required for plaintiffs employment to find a purchaser.

V. NO PRESENTATION OF CLAIM TO THE STATE APPOINTED EXECUTOR WAS REQUIRED AS A PRE-REQUISITE TO ACTION IN THE FEDERAL COURT BASED ON DIVERSITY OF CITIZENSHIP.

The court found that no action would lie against the defendant, Security-First National Bank, as Executor of the Estate of Thomas J. Neilan, because the claim was not first submitted to the Executor before suit was commenced in the Federal Court.

However it should be noted that if such presentation was required as a condition precedent to action in Federal Court, which plaintiff believes is not the law, it was certainly cured by said defendant's admission in its answer (R. 15) that such claim was presented to it on June 11, 1958, prior to plaintiff's amended complaint, filed July 3, 1958 (R. 10) and its admissions in Response No. 3 (R. 44) that such claim was rejected by the Executor on June 30, 1958, also prior to plaintiff's amended complaint filed on July 2, 1958.

California law does not prevent suit after denial of claim, and it is submitted that the amendment of complaint to plead such additional facts after the executor's denial of the claim would satisfy any requirement for presentation in the State Court.

But if it is defendants' contention that the California statutes could completely bar action in the United States District Court based on the necessary Diversity of Citizenship, then it is in error, as was the Court below in denying its own jurisdiction.

This question has been answered many times by the United States Supreme Court, but very clearly in *Clark v. Beaver*, 139 U. S. 96; 35 L. Ed. 88; 11 S. Ct. 468:

“The controverted question of debt or no debt, is one which, if the representative of the decedent is a citizen of a State different from that of the other party, the party properly situated has a right given by the Constitution of the United States to have tried originally or by removal, in a Court of the United States, which cannot be defeated by state statutes enacted for the more convenient settlement of estates of decedents.”

(See also *Hess v. Reynolds*, 113 U. S. 73) (28 L. Ed. 927; 5 S. Ct. 377.

RELIEF

It is therefore respectfully submitted that the order granting summary judgment for defendants and dismissing the action should be reversed and the case remanded to the District Court for trial on its merits.

HARRY H. MEISNER,
Plaintiff and Appellant, appearing in Propria Persona,
2233 National Bank Building,
Detroit 26, Michigan.

No. 16358.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY H. MEISNER,

Appellant,

vs.

RELIANCE STEEL & ALUMINUM Co., a corporation and
SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,
Executor of the Estate of Thomas J. Neilan, Deceased,

Appellees.

APPELLEES' BRIEF.

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FILED

JUN 29 1959

AUL P. O'BRIEN, CLERK

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I.

At the time of the hearing on defendants' motion for summary judgment, no genuine issue as to any material fact existed. Accordingly, the action was then in a proper posture for disposition by summary judgment.....	9
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II.

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Plaintiff's action commenced June 2, 1958, against the Bank as executor was premature because no cause of action against Neilan's estate arose until after presentation to the bank on about June 11, 1958, of plaintiff's creditor's claim. Under the California law, no cause of action arises against the estate of a deceased person unless and until a creditor's claim is first presented to the personal representative of the deceased or is filed with the clerk of the court in which the proceedings relative to the estate of such deceased person are pending 23

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No. 16358.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY H. MEISNER,

Appellant,

vs.

RELIANCE STEEL & ALUMINUM Co., a corporation and
SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,
Executor of the Estate of Thomas J. Neilan, Deceased,

Appellees.

APPELLEES' BRIEF.

Statement Showing Jurisdiction.

Plaintiff's amended complaint alleges that he is a citizen of the State of Michigan, that both the defendants are citizens of the State of California and that the amount in controversy exceeds the sum of \$3,000.00 exclusive of interest and costs. [R. 7.] These facts are admitted by the answers of the defendants. [R. 11, 14.]

The action was commenced on June 2, 1958. [R. 119.] Jurisdiction of the district court was founded upon diversity of citizenship and an amount in controversy in excess of then existing jurisdictional minimum under 70 STAT. 658 (1956), 28 U. S. C. 1332.

This appeal by the plaintiff is from the final judgment of the district court. [R. 115.] Timely notice of appeal was filed and the appeal duly perfected. [R. 116.] Jurisdiction of the court of appeals is founded upon 72 STAT. 348 (1958), 28 U. S. C. 1291.

Statement of the Case.

Appellees do not accept appellant's statement of the case (App. Op. Br. pp. 3-6) for the reason that it disregards material facts admitted during the course of the discovery proceedings below. At the close of such discovery proceedings and in compliance with the local rules of the district court relative to pre-trial conference hearings, defendants prepared and submitted to plaintiff a concise statement of material facts. [R. 51-57.] Plaintiff characterized the statement as excellent and accurate in all but minor, defined respects. [R. 97-98.] Accepting plaintiff's version of each of the controverted matters of fact, appellees submit the following statement of the case as a statement of agreed facts:

Plaintiff is a lawyer admitted to practice and practicing law in the State of Michigan. [R. 51.] Defendant Reliance Steel & Aluminum Co. (hereinafter called "Reliance Steel") is a California corporation principally engaged in the business of jobbing fabricated steel and aluminum. [R. 51.] Defendant Security-First National Bank (hereinafter called the "Bank") is a national banking association having its principal place of business in the State of California. [R. 52.] The Bank is sued in its capacity as executor of the will of Thomas J. Neilan (hereinafter called "Neilan"). [R. 52.] In his lifetime, Neilan was the president and one of the directors and indirectly controlled a majority of the shares of Reliance Steel. [R. 52.] The Bank is the duly appointed, qualified and acting executor of Neilan's will in probate proceedings now pending in the Superior Court of the State of California in and for the County of Los Angeles (L. A. Superior Court No. 397,909). [R. 52.]

On about April 4, 1957,¹ plaintiff first learned from an advertisement anonymously appearing in the April 2, 1957, edition of the Wall Street Journal that a West Coast steel jobbing business was for sale. [R. 52.] On about April 8, 1957, plaintiff made letter inquiry responsive to the advertisement expressing interest in purchase of the business. [R. 53.] On about April 12, 1957, the anonymous advertiser replied by letter identifying himself as one Jack Moore (hereinafter called "Moore") and enclosing limited financial data relative to Reliance Steel. [R. 53.] Moore did not disclose the identity of the business, its form of structure, the principals involved or his relationship to the business. [R. 53.] A desultory correspondence between Moore and plaintiff ensued. [R. 53.] Neither party made disclosure of the identity of the entities each represented. [R. 53.]

On about June 15, 1957, Moore advised Neilan of the interest of plaintiff's client in the purchase of the business of Reliance Steel. [R. 53.] Following receipt of Moore's advice, Neilan instructed one of the officers of Reliance Steel, William T. Gimbel (hereinafter called "Gimbel"), to contact plaintiff to determine the identity of the principals that plaintiff represented and to obtain a more precise idea of their interest. [R. 53.] Neilan thereafter advised Moore of his instructions to Gimbel. [R. 53.]

On about July 11, 1957, Moore informed plaintiff by telephone that a representative of Reliance Steel would call for an appointment at plaintiff's offices in Detroit within a week. [R. 41.] On about July 20, 1957, Gimbel visited plaintiff in plaintiff's law offices in Detroit. [R. 98.] Plaintiff refused to divulge his client's identity without first obtaining Reliance Steel's written commit-

¹The date in the transcript reference is April 4, 1958; the context makes clear that the year intended is 1957.

ment that he, plaintiff, would be entitled to a broker's commission in the event of consummation of the sale. [R. 107.] Following their discussion, Gimbel returned to California and dispatched his July 30, 1957, letter to plaintiff, confirming their July 20 conversation, disclaiming any interest on the part of Reliance Steel in the hiring of plaintiff and relating that Moore had been given the opportunity to locate an acceptable buyer for the business of Reliance Steel under an informal agreement whereby Moore would receive a fee commensurate with his efforts. [R. 55; Ex. E at R. 87-88.]

On July 21, 1957, plaintiff telephoned Moore to obtain a commission participation commitment. [R. 54.] Moore represented to plaintiff that he had an agreement with Reliance Steel whereby he, Moore, would receive a sales commission of 5% of the first million dollars plus 2½% of the balance of the purchase price for the stock, assets or business of Reliance Steel if and when such a sale were consummated. [R. 54.] In the course of the telephone conversation, plaintiff and Moore reached an agreement whereby Moore promised plaintiff one-half the total sales commission realized by Moore from the sale of the stock, assets or business of Reliance Steel if plaintiff were responsible for the consummation of such sale. [R. 54-55.] That agreement was confirmed by an exchange of letters between Moore and plaintiff. [R. 55; App. Op. Br. p. 4; Ex. C at R. 85; Ex. D at R. 86.]

Believing himself assured of participation in a sales commission by his agreement with Moore, plaintiff wrote Moore a July 20, 1957, letter, copy to Gimbel, disclosing the names of the persons he represented to be prospective purchasers. [R. 55.]

On about August 5, 1958, a representative or associate of Myron Hokin (hereinafter called "Hokin"), one of

the persons proposed by plaintiff as interested in the purchase, arrived in Los Angeles to visit the premises where plaintiff's business was conducted. [R. 55.] On about August 12, 1957, plaintiff and Hokin and several of Hokin's associates came to Los Angeles to open negotiations for the purchase of the business on a cash basis. [R. 55.] The proposal of Reliance Steel made at that time is embodied in its August 15, 1957, letter to Hokin. [Ex. No. 1 at R. 48-50.]

On about August 27, 1957, Hokin and his associates again came to Los Angeles accompanied by a Mr. Haase, a Vice-President of the First National Bank of Chicago, the financing agency in the transaction. [R. 56.] After extended discussion with Reliance Steel, Hokin withdrew from the negotiations because the parties were unable to agree on the purchase price and other material terms of the sale. [R. 56.]

In September, 1957, plaintiff made an effort to revive the deal. [R. 56.] Plaintiff procured from Hokin in Chicago:

a. Hokin's September 30, 1957, letter addressed to Reliance Steel [reproduced as a part of Ex. B at R. 79-82], setting forth an offer to purchase the therein identified assets of the corporation on the terms and subject to the conditions therein set forth;

b. Hokin's September 30, 1957, letter to Paul D. Dodds, a Vice-President of the Bank [Ex. A at R. 78-79], enclosing a copy of the above offer and notifying the Bank of his intention to open an escrow "subject to the parties' entering into a mutually satisfactory contract";

c. A cashier's check drawn in favor of the Bank by The First National Bank of Chicago in the sum of \$250,000. [R. 56.]

Plaintiff enplaned for California armed with the check and letters. [R. 57.] He presented the proposal to Reliance Steel in Los Angeles. [R. 57.] Further negotiations with Reliance Steel were pursued in that City by plaintiff. [R. 57.] In an effort to induce Reliance Steel to sell the assets identified in Hokin's September 30, 1957, letter at the reduced price therein provided for, plaintiff stated he would forego one-half of the share of the total sales commission to which he would be entitled under his agreement with Moore, thus reducing the total sales commission payable by Reliance Steel in the event a sale were consummated. [R. 57.] As a result of the negotiations in Los Angeles and the plaintiff's representation relative to his share of the commission, Reliance Steel and Neilan endorsed the Hokin September 30, 1957, letter [Ex. B at R. 79-82] after first preparing and attaching thereto a rider bearing date October 2, 1957. [Ex. B at R. 83-84.] Plaintiff left the Hokin letter to Dodds and the \$250,000 cashier's check with Neilan and returned to Chicago to obtain Hokin's approval of the October 2, 1957, rider. [R. 57.] Plaintiff obtained the approval of Hokin in Chicago and dispatched the approved rider to Neilan by mail, together with instructions to present the cashier's check and the Hokin letter to Dodds at the Bank. [R. 57.] Neilan complied. [R. 57.] Plaintiff was not at any time while actively engaged within the State of California in such negotiations licensed either as a business opportunity broker or salesman. [R. 21, par. 59; R. 24, par. 59.]

On about November 12, 1957, Neilan dispatched a letter bearing that date to plaintiff. [R. 38-39, pars. 18, 20; Ex. H at R. 89-90.] Enclosed therewith was a form of letter for plaintiff's execution providing for direct payment of a percentage sales commission to plaintiff by Reliance Steel if and when a formal contract of purchase and

sale were executed and the sale consummated and provided that plaintiff would forego one-half of the commission to which he would be otherwise entitled under his agreement with Moore. [R. 38-39, par. 19; Ex. J at R. 90-91.] Plaintiff did not execute the Neilan November 12 letter enclosure. [R. 59.] Instead, on November 18, 1957, plaintiff wrote Neilan enclosing a letter bearing the same date wherein he offered to accept a flat fee of \$30,000 payable directly to him on the close of escrow if and when a formal purchase and sale agreement were executed and the sale consummated. [R. 59; Exs. K and L at R. 91-94.] Neilan died November 17, 1957, prior to the dispatch of plaintiff's letter offer. [R. 59.]

Plaintiff's claim against Neilan's estate was not presented to the Bank, as executor of Neilan's will, until about June 11, 1959, after this action had been commenced. [R. 9, par. 8, plaintiff's amended complaint; R. 15, first defense of the Bank's answer; R. 119, Docket Entries.]

Plaintiff contends that he completed the performance of his alleged agreement and became entitled to a commission when Hokin signed the October 2, 1957, rider to his September 30, 1957, letter. [R. 19, par. 45; R. 23, par. 45.] Plaintiff admits that the September 30, 1957, letter together with the October 2, 1957, rider thereto [Ex. B at R. 79-84] is the only purported agreement to purchase and sale of the business or assets of Reliance Steel upon which he relies in his contention that he is entitled to a commission. [R. 26, par. 8; R. 27, par. 8.]

Summary of Argument.

I. At the time of the hearing on defendants' motion for summary judgment, no genuine issue as to any material fact existed. Accordingly, the action was then in a proper posture for disposition by summary judgment.

II. Plaintiff was not a party to any contract of employment relative to the sale of the assets or the capital stock or the business of Reliance Steel to which Reliance Steel and Neilan, or either of them, were parties.

III. Payment of compensation to plaintiff under his alleged employment agreement was contingent upon consummation of a sale of the assets or the capital stock or the business of Reliance Steel. No sale and no valid and enforceable contract of sale of the assets or the capital stock or the business of Reliance Steel was ever made. A preliminary form of agreement which leaves material or essential terms for future agreement is not a valid and enforceable contract.

IV. Plaintiff was not entitled to any compensation for his services because, while unlicensed and in expectation of compensation, he actively participated within the State of California in the negotiations for the purchase of the assets of Reliance Steel. The California law requires that all persons be licensed who, for compensation or in expectation of compensation, solicit for prospective purchasers or negotiate the purchase and sale of a business or a business opportunity.

V. Plaintiff's action commenced June 2, 1958 against the Bank as executor was premature because no cause of action against Neilan's estate arose until after presentation to the Bank on about June 11, 1958 of plaintiff's creditor's claim. Under the California law, no cause of action arises against the estate of a deceased person unless and until a creditor's claim is first presented to the personal representative of the deceased or is filed with the clerk of the court in which the proceedings relative to the estate of such deceased person are pending.

ARGUMENT.

I.

At the Time of the Hearing on Defendants' Motion for Summary Judgment, No Genuine Issue as to Any Material Fact Existed. Accordingly, the Action Was Then in a Proper Posture for Disposition by Summary Judgment.

By his amended complaint, plaintiff alleged: that he was employed by the defendants to find a purchaser ready, willing and able to purchase the assets of Reliance Steel on terms mutually agreeable to buyer and seller; that he found such a purchaser who entered into a contract of sale with Reliance Steel; and, that pursuant to his employment agreement, plaintiff thereby became entitled to a commission which defendants have refused to pay.

Following the commencement of this action, discovery proceedings were pursued by defendants. Plaintiff responded under oath to the interrogatories and requests for admissions that were served upon him. [R. 18-42.] By his sworn answers and admissions, plaintiff himself controverted the allegations of the amended complaint.

Defendants thereupon moved for summary judgment. The motion was based upon plaintiff's sworn answers and admissions and upon the uncontroverted affidavit of William T. Gimbel. [R. 62.] No effort was at any time undertaken by plaintiff to amend or in any way alter his sworn answers and admissions. At the hearing on the motion for summary judgment, the trial court had before it a record devoid of controversy as to any fact material to an adjudication of the action upon its merits. Accordingly, the trial court ruled upon the issues of law as framed by the pleadings, files and records in the action.

Plaintiff now urges on appeal that the trial court erred in granting the motion for summary judgment because there were triable issues of fact presented. (App. Op. Br. pp. 7-12.) No specification is made of what triable issues of fact were presented to the trial court, as indeed none can be made. The existence of the commission agreement and the legal relations created thereby, if any (App. Op. Br. pp. 10-11), is a matter of law to be determined by the court in the light of the admitted facts. Performance by plaintiff of the commission agreement (App. Op. Br. pp. 11-12) based upon the enforceability of the purported purchase and sale agreement [Ex. B at R. 79-84] must, perforce, rest upon resolution of the legal issue of whether that purported purchase and sale agreement is a binding contract or merely an agreement to agree in futuro. Whether the defendants waived the provision of the commission agreement that payment was contingent upon consummation of a sale (App. Op. Br. p. 12) is wholly immaterial unless the court concludes as a matter of law, first, that the defendants or either of them are parties to the commission agreement [Exs. C and D at R. 85-86] and, second, that the purported purchase and sale agreement of the assets of Reliance Steel [Ex. B at R. 79-84] is an enforceable contract. Finally, the allegations of the amended complaint though concededly well-pleaded (App. Op. Br. pp. 8-9) cannot stand in the face of the plaintiff's own contradictory sworn answers and admissions. (*Suckow Borax Mines Consol. v. Borax Consolidated*,² 185 F. 2d

²In the *Suckow* case, responsive to appellant's contention that the affidavits, filed by the moving party in support of a motion for summary judgment, cannot be used to contradict the well-pleaded allegations of a complaint, the court stated (185 F. 2d at 205):

"But when a general statement in a pleading is shown by specific facts stated in controverting affidavits, depositions and

196, 9 Cir., cert. denied 340 U. S. 943, rehearing denied, 341 U. S. 912; *Koepke v. Fontecchio*, 9 Cir., 177 F. 2d 125, 127; *Lindsey v. Leavy*,³ 9 Cir., 149 F. 2d 899; *Piantadosi v. Loew's Inc.*, 9 Cir., 137 F. 2d 534.)

II.

Plaintiff Was Not a Party to Any Contract of Employment Relative to the Sale of the Assets or the Capital Stock or the Business of Reliance Steel to Which Reliance Steel and Neilan, or Either of Them, Were Parties.

By his amended complaint, plaintiff alleged that Reliance Steel and Neilan employed him and Jack Moore "by various instruments in writing . . . to find a purchaser ready, willing and able to purchase . . ." the assets or capital stock of Reliance Steel on terms mutually acceptable to buyer and seller. [R. 8, par. 4.] Discovery disclosed that plaintiff was unable to produce or identify any writing evidencing an employment agreement between Neilan and Reliance Steel, or either of them, and himself. [R. 63-64.] Plaintiff now concedes (App. Op. Br. p. 4) that the employment agreement by which he was

admissions, to be untrue, and the facts so presented are not denied and are not of such nature as to be peculiarly within the knowledge of the affiant, then no 'genuine' issue remains for the trier of the facts."

³In the *Lindsey* case, where plaintiff complained on appeal from an adverse summary judgment that there were triable issues of fact raised by his complaint, the court, affirming the judgment, replied (149 F. 2d at 902):

"The sufficiency of the allegations of a complaint do not determine the motion for summary judgment. Cases dealing with and construing Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, clearly indicate to the contrary and if this were not the case, Rule 56 would be a nullity for it would merely duplicate the motion to dismiss. For a further discussion of this principle see 3 Moore's Federal Practice, pp. 3174, 3175. The rule is now well established in the many cases dealing with the problem."

first hired was with Moore and is evidenced by Moore's July 21, 1957 letter to plaintiff and plaintiff's July 25, 1957 letter reply. [Exs. C and D at R. 85-86.]

A reading of that employment agreement reveals that plaintiff was hired by Moore on a split commission basis, not to find a purchaser ready, willing and able to purchase the assets or the business of Reliance Steel, but to initiate, negotiate and consummate a sale on terms mutually acceptable to buyer and seller. Plaintiff expressed to Moore his own understanding of the employment as follows [Ex. D at R. 86]:

"I am in receipt of your letter of July 21st confirming our fee arrangement which is an equal division between us of the total commissions to be received from the Reliance Steel and Aluminum Company of Los Angeles *upon the completion of a deal initiated and concluded by me.*" (Emphasis added.)

In paragraph 5 of the first and second counts of the amended complaint, plaintiff alleged that a subsequent agreement was made between the parties providing that one-half of the commission payable upon consummation of the sale would be paid directly to plaintiff and the other half to Moore. [R. 8, 10.] Plaintiff contends that such subsequent agreement was made by an exchange of letters between Neilan and himself dated, respectively, November 12 and 18, 1947.⁴ [R. 64, quoting from R. 18-19 and 22.]

Appellees contend that the Neilan November 12 letter enclosure [Ex. J at R. 90-91] constituted an offer on the part of Neilan to pay plaintiff the percentage commission

⁴The Neilan November 12, 1957, letter and letter enclosure are set forth as Exhibits H and J, respectively, at R. 89-91. The November 18 letter and letter enclosure from plaintiff to Neilan are set forth as Exhibits K and L, respectively, at R. 91-94.

therein set forth if and when a purchase and sale agreement for the assets of Reliance Steel were executed. Plaintiff has admitted that he did not execute the Neilan November 12 letter enclosure. [R. 69-70, quoting from R. 31 and 39.] Instead, plaintiff prepared and executed the November 18 letter [Ex. K at R. 91-93] and letter enclosure [Ex. L at R. 93-94] and forwarded the same by United States mail to Neilan, the addressee. [R. 70, quoting from R. 31-32 and R. 39-40.] The November 18 letter enclosure by its terms seeks an agreement that the commission payable upon execution of a final purchase and sale agreement for the assets of Reliance Steel shall be the fixed amount of \$30,000, not the percentage commission provided for in Neilan's November 12 letter enclosure. [Ex. J at R. 90-91.] The plaintiff's November 18 letter enclosure constituted, as a matter of law, a counter-offer on the part of plaintiff and a rejection of Neilan's offer as embodied in his November 12 letter enclosure. (*American Aeronautics Corp v. Grand Central Aircraft Co.*, 155 Cal. App. 2d 69, 79, 317 P. 2d 694, 701; *Haywood Lumber & Inv. Co. v. Construction Products Corp.*, 117 Cal. App. 2d 221, 227, 255 P. 2d 473, 476-477; *Ajax Holding Co. v. Heinsbergen*,⁵ 64 Cal. App. 2d 665, 669-670, 149 P. 2d 189, 192.)

Neilan died November 17, 1957. [R. 28, 36.] There could not, therefore, have been an acceptance by Neilan of plaintiff's November 18 flat fee proposal.

⁵"To be effective an acceptance must be unequivocal and positive and must comply with the terms of the offer. [Cite omitted.] It must be approved in the terms in which it is made. The addition of any condition or limitation is tantamount to a rejection of the original offer and the making of a counter-offer. [Cite omitted.] A counter-offer containing a condition different from that in the original offer is a new proposal and, if not accepted by the original offeror, amounts to nothing." (64 Cal. App. 2d at 669-670, 149 P. 2d at 192.)

III.

Payment of Compensation to Plaintiff Under His Alleged Employment Agreement Was Contingent Upon Consummation of a Sale of the Assets or the Capital Stock or the Business of Reliance Steel. No Sale and No Valid and Enforceable Contract of Sale of the Assets or the Capital Stock or the Business of Reliance Steel Was Ever Made. A Preliminary Form of Agreement Which Leaves Material or Essential Terms for Future Agreement Is Not a Valid and Enforceable Contract.

Absent an expression to the contrary in his employment agreement, a broker is not entitled to a commission unless a sale is consummated or a valid and enforceable contract of sale made. (*Keeler v. Glendon*,⁶ 124 Cal. App. 2d 634, 268 P. 2d 1089.) The employment contract, of course, gives the measure of the broker's right. (*Rutherford v. Berick*, 82 Cal. App. 2d 331, 186 P. 2d 23.)

⁶"Moreover, our law has always required a broker to bring a sale to a point where there is a valid and enforceable agreement between seller and buyer before he is entitled to a commission.

'Before a broker is entitled to compensation, the negotiations which he is authorized to make must be concluded or conducted to the state where, as to all the material or essential terms of the sale, there is a meeting of the minds or an agreement between the principal and the customer produced by him; but if the principal and customer are unable to come to terms, the broker cannot recover.' [Cites omitted.]

'Plaintiff was entitled to a commission only if defendant and Neidorf came to a meeting of the minds as to the terms of sale and if the contract did not fail of consummation through the fault of defendant.' [Cites omitted.]

In 9 Cal. Jur. 2, Sec. 80, . 242, it is said:

'The duty assumed by him (the broker) is to bring the principal and the customer to an agreement, and until this is done, his right to commissions does not accrue.' " (124 Cal. App. 2d at 637-638, 268 P. 2d at 1091.)

In the instant action, plaintiff concedes that payment of compensation to him under his commission agreement with Moore [Exs. C and D at R. 85-86] was contingent upon consummation of a sale of the assets or the business of Reliance Steel. (App. Op. Br. p. 5.) The plain language of each of the writings which plaintiff contends evidence his employment agreement [Exs. C and D at R. 85-86; Ex. L at R. 93-94] contemplates either consummation of a sale on terms mutually satisfactory to Reliance Steel and the prospective purchaser or the execution of a final purchase and sale agreement.

Under the law and by the express terms of his employment contract, plaintiff was not entitled to compensation by merely finding or introducing a prospective purchaser to Reliance Steel. Plaintiff was entitled to commission compensation only in the event he brought the sale to completion or an enforceable contract of sale were made. (*Connor v. Riggins*,⁷ 21 Cal. App. 756, 132 Pac. 849.)

Plaintiff concedes that no sale of the assets or the business of Reliance Steel was made. [R. 9, par. 6 of the amended complaint.] Plaintiff contends that the sale was not made because defendants refused to perform a purported purchase and sale agreement. [Ex. B at R. 79-84.] Plaintiff admits that such purported purchase and sale

⁷In the *Connor* case, an action for a commission by the assignee of a broker who allegedly rendered services in pursuance of an exchange of realty which was never consummated, the court said (21 Cal. App. at 760, 132 Pac. at 851):

“Moreover, since the word ‘consummate’ means to bring to completion, and the court found that the oral agreement was to *consummate* an exchange of both the real and personal property of defendant, and ‘that said trade or exchange of the properties between J. W. Riggins and John T. Sweatt has never been consummated,’ it would seem clear that plaintiff is not entitled to recover commissions.”

agreement is the only agreement upon which he relies in his contention that he is entitled to commission compensation. [R. 26, par. 8; R. 27, par. 8.]

Defendants submit that the purported purchase and sale agreement, comprising the September 30, 1957 letter with the October 2, 1957 rider attached thereto [Ex. B at R. 79-84] constitutes nothing more than an agreement to agree. The provisions of the purported sale agreement were explicitly made nugatory unless and until a formal contract should be executed by the parties. Further, consummation of the sale and lease of the property therein described was expressly conditioned, *inter alia*, upon: (i) obtaining the approval of designated suppliers to Reliance Steel to continue their present consignment and distributorship agreements with the prospective purchaser; and, (ii) the execution by and between such prospective purchaser and the "present key personnel" of Reliance Steel of "mutually satisfactory employment agreements." [R. 81-82.]

The purported sale agreement expressly contemplates further negotiations. The October 2, 1957, rider provides in part that the prospective purchaser shall negotiate the procurement of the agreement and approval of said suppliers to continue their consignment and distributorship agreements. It also provides that the purchaser shall complete his negotiations with "present key personnel" relative to the consummation of mutually satisfactory employment agreements prior to the determination of the price of the assets contemplated to be sold. [R. 82.] In addi-

tion, the rider explicitly calls for a "lease satisfactory to both parties as to form." [R. 84.]

Either party, by the very terms of the undertaking, could refuse to agree to anything to which the other party might agree. Under such conditions, any promise made is unenforceable. The purported sale agreement was not, therefore, a valid and enforceable contract. (1 *Williston on Contracts*, Sec. 45, p. 131 (1936 Ed.); *Autry v. Republic Productions, Inc.*,⁸ 30 Cal. 2d 144, 180 P. 2d 888; *Roberts v. Adams*,⁹ 164 Cal. App. 2d 312, 330 P. 2d 900; *Ajax Holding Company v. Heinsberger*,¹⁰ 64 Cal. App. 2d 665, 149 P. 2d 189.)

Plaintiff urges that a \$250,000 deposit on the purchase price was made in pursuance of the purported purchase and sale agreement. (App. Op. Br. p. 3.) Reference to the letter of instructions [Ex. A at R. 78-79] transmitting the cashier's check in the sum of \$250,000 reveals that the

⁸"There is no dispute that neither law nor equity provides a remedy for breach of an agreement to agree in the future. Such a contract cannot be made the basis of a cause of action. (*Klein v. Markarian*, 175 Cal. 37 [165 P. 3]; *Los Angeles Immigration & Land Co-operative Assn. v. Phillips*, 56 Cal. 539; *Dillingham v. Dahlgren*, 52 Cal. App. 322 [198 P. 832] and cases cited.) The court may not imply what the parties will agree upon. (*Kerr Glass Mfg. Corp. v. Elizabeth Arden Sales Corp.*, 61 Cal. App. 2d 55 [141 P. 2d 938].)" (30 Cal. 2d at 151-152, 180 P. 2d at 893.)

⁹"It is hornbook law that an agreement to make an agreement is nugatory, and that this is true of material terms of any contract." (164 Cal. App. 2d at 314, 330 P. 2d at 901.)

¹⁰"* * * Where a preliminary contract leaves certain terms to be agreed upon as the final contract it may not be inferred upon what the parties will agree. (*Kerr Glass Mfg. Corp. v. Elizabeth Arden Sales Corp.*, 61 Cal. App. 2d 55 [141 P. 2d 938].)" (64 Cal. App. 2d at 671, 149 P. 2d at 193.)

check was not a deposit on the purchase price at all. The Bank as addressee of that letter was expressly instructed to hold the check pending further directions and pending the parties entering into a mutually satisfactory contract and escrow agreement. No escrow was to be opened according to the letter of instructions and the proposal enclosed therewith [Ex. B at R. 79-84] unless and until a mutually satisfactory contract was executed. By the letter of instructions, Hokin, the prospective purchaser, clearly contemplated further negotiations to the end of consummating a mutually satisfactory formal contract.

Finally, whether a writing constitutes a final agreement or merely an agreement to agree at some future time depends primarily upon the intention of the parties. (*Smis-saert v. Chiodo*,¹¹ 163 Cal. App. 2d 827, 330 P. 2d 98; *Forgeron Inc. v. Hansen*, 149 Cal. App. 2d 352, 360, 308 P. 2d 406, 411; *Kuhn v. Gottfried*,¹² 103 Cal. App. 2d 80,

¹¹“Whether a writing constitutes a final agreement or merely an agreement to make an agreement depends primarily upon the intention of the parties. . . . The intent of the parties is to be determined by an objective standard and not by the unexpressed state of mind of the parties. [Cite omitted.] Where any of the terms are left for future determination or there is a manifest intention that the formal agreement is not to be complete until reduced to a formal writing to be executed, there is no binding contract until this is done. [Cite omitted.]” (163 Cal. App. 2d at 830-831, 330 P. 2d at 100-101.)

¹²“‘When it is part of an understanding between the parties that the terms of a contract are to be reduced to writing and signed by them, assent to its terms must be evidenced in the manner agreed upon else it does not become a binding contract.’ [Cite omitted.]” (103 Cal. App. 2d at 85, 229 P. 2d at 140.)

229 P. 2d 137; *Store Properties, Inc. v. Neal*,¹³ 72 Cal. App. 2d 112, 164 P. 2d 38.)

In the instant action, the intention of the parties is unambiguously manifested in the October 2, 1957 rider to the September 30, 1957 letter offer. [R. 84.] The express terms of the rider provide that the "letter offer of September 30, 1957, and the terms in this rider *shall be of no force and effect* unless formally accepted and approved on or before October, 1957, and a formal contract shall be executed by the parties on or before October, 1957." (Emphasis added.) Defendants submit that even had the September 30, 1957 letter offer contained all the essential elements of a contract, the parties conditioned its legal efficacy by their execution of the rider on the execution of a formal document which would contain all the incidental terms of their agreement. The manifested intent of the parties, coupled with the uncertainties and the conditions of the September 30, 1957 letter offer itself, are demonstrably incompatible with any contention that an enforceable contract of sale was made.

¹³"When it is the understanding that the terms of a contract are to be reduced to writing and signed by the parties, assent to its terms must be evidenced by a writing subscribed by all of them; otherwise it does not become a completed contract. [Cite omitted.] When only the principal provisions of a lease are agreed upon, leaving the details and conditions to be expressed in a writing to be executed by the parties, and such writing is never signed by those to be charged, it never becomes a binding obligation upon either. [Cite omitted.] If parties contemplate a reduction to writing of their agreement before it can be considered complete, there is no contract until the writing is signed. (1 Williston on Contracts, 59.) If a writing is viewed as the consummation of the negotiations there is no contract until the written draft is finally signed. [Cite omitted.] To be finally settled an agreement must comprise all the material terms and conditions which the parties intend to introduce. In their absence there is no completed contract. [Cites omitted.]" (72 Cal. App. 2d at 116-117, 164 P. 2d at 40.)

IV.

Plaintiff Was Not Entitled to Any Compensation for His Services Because, While Unlicensed and in Expectation of Compensation, He Actively Participated Within the State of California in the Negotiations for the Purchase of the Assets of Reliance Steel. The California Law Requires That All Persons Be Licensed Who, for Compensation, or in Expectation of Compensation Solicit for Prospective Purchasers or Negotiate the Purchase and Sale of a Business or a Business Opportunity.

Plaintiff actively participated in the negotiation of the purchase and sale of the assets of Reliance Steel. [R. 57, 94-97.] He was admittedly present in the State of California on several occasions for that purpose. [R. 20, pars. 46 and 47; R. 23, pars. 46 and 47.] Indeed, following the withdrawal of Hokin and his associates from the August, 1957 negotiations, plaintiff alone revived the deal by soliciting the September 30, 1957 letter offer of Hokin. [R. 56.] Plaintiff then enplaned for California to present Hokin's modified proposal to Reliance Steel. [R. 57.] Neilan and plaintiff negotiated the October 2, 1957 rider which plaintiff took to Chicago personally to present to Hokin for his approval. [R. 57.]

Plaintiff participated not only in effecting introductions of prospective purchasers to Neilan and Reliance Steel. He also participated in the negotiations themselves, as he was obligated to do under the terms of his commission agreement with Moore. [Exs. C and D at R. 85-86.] But for plaintiff's active participation in such negotiations, the purported purchase and sale agreement, comprising the September 30, 1957 letter with the October 2, 1957

rider attached thereto [Ex. B at R. 79-84], would never have been executed. [R. 57.]

The California law requires that all persons who actively solicit or participate in the negotiations for the purchase and sale of a business or business opportunity within the State of California be licensed.¹⁴ Failure to be so licensed precludes the person soliciting or negotiating such purchase and sale from any compensation for his services.¹⁵ Indeed, payment to plaintiff of any compensation for his services would, perforce, expose defendants to the criminal sanctions of the California law.¹⁶ Plaintiff admits he was not licensed as a business opportunity broker or salesman¹⁷

¹⁴Section 10250, Business & Professions Code of the State of California (hereinafter cited as "Bus. & Profs. Code"): "It is unlawful for any person to engage in the business, act in the capacity of, or assume to act as a business opportunity broker or a business opportunity salesman within this State without first obtaining a license from the division. . . ."

Section 10251, Bus. & Profs. Code: 'As used in this part, the words 'business opportunity' shall mean and include business, business opportunity and good will of an existing business or any one or combination thereof.'

¹⁵Section 10257, Bus. & Profs. Code: "No person engaged in the business or acting in the capacity of a business opportunity broker or a business opportunity salesman within this State shall bring or maintain any action in the courts of this State for the collection of compensation for the performance of any of the acts mentioned in this article without alleging and proving that he was a duly licensed business opportunity broker or business opportunity salesman at the time the alleged cause of action arose."

¹⁶Section 10259, Bus. & Profs. Code: "It is a misdemeanor, punishable by a fine of not exceeding fifty dollars (\$50) for each offense, for any person, whether obligor, escrow holder or otherwise, to pay or deliver to anyone a compensation for performing any of the acts within the scope of this chapter, who is not known to be or who does not present evidence to such payor that he is a regularly licensed business opportunity broker at the time such compensation is earned. . . ."

¹⁷Section 10252, Bus. & Profs. Code: "A business opportunity broker within the meaning of this part is a person who, for a compensation, sells or offers for sale, rents, or offers to rent, or col-

at any time while participating within the State of California in the negotiations for the sale of the assets of Reliance Steel. [R. 21, par. 59; R. 24, par. 59.] His activities performed within the State of California were therefore unlawful and non-compensable. (*Pavolak v. Cox*, 148 Cal. App. 2d 294, 306 P. 2d 619, 622.¹⁸)

lects rent, buys, or offers to buy, lists, leases or offers to lease, or solicits for prospective tenants or purchasers, or negotiates loans on, or negotiates the purchase or sale or the renting, leasing or exchanging of a business, business opportunity, or interest therein, or the good will of an existing business for another or others.”

Section 10253, Bus. & Profs. Code: “A business opportunity salesman within the meaning of this part is a natural person who for a compensation is employed by a licensed business opportunity broker to sell or offer for sale, to rent, or offer to rent, or collect rent, or to list or offer to list, or to buy or to offer to buy, or to lease or offer to lease, or to solicit for prospective tenants or purchasers, or to negotiate loans on, or to negotiate the purchase or sale or the renting, leasing, or exchanging of a business, business opportunity, or interest therein, or the good will of an existing business.”

¹⁸A parallel situation was presented to the court in *Owen v. Off*, 36 Cal. 2d 751, 227 P. 2d 457. That case arose under the provisions of the Corporate Securities Act of 1917 as amended (now Sec. 25700 of the Corporations Code of the State of California, a section applicable to securities brokers which is substantially the same as Sec. 10250 of the Business & Professions Code applicable to business opportunity brokers). There the plaintiff contended that, because he was not a broker regularly engaged in the business of selling securities, but was merely hired in an isolated transaction to sell or negotiate for the sale of certain securities, he was not required to procure a license. The court disagreed. In the instant action, the argument that an isolated transaction by one acting as a broker will not prevent recovery of the commission is precluded by a specific statutory provision of the Business & Professions Code: “One act, for a compensation of buying or selling a business opportunity of or for another, or offering for another to buy or sell or exchange a business opportunity, or negotiating the purchase or sale or exchange of, or listing or soliciting prospective purchasers of business opportunities, or negotiating a loan on or leasing or renting or placing for rent a business opportunity, or collecting rent therefrom constitutes the person making such offer, sale or purchase, exchange or lease, or negotiating the loan, or so renting or placing for rent or collecting the rent or listing or soliciting, a business opportunity broker or salesman within the meaning of this part.” (Bus. & Profs. Code, Sec. 10255.)

V.

Plaintiff's Action Commenced June 2, 1958, Against the Bank as Executor Was Premature Because No Cause of Action Against Neilan's Estate Arose Until After Presentation to the Bank on About June 11, 1958, of Plaintiff's Creditor's Claim. Under the California Law, No Cause of Action Arises Against the Estate of a Deceased Person Unless and Until a Creditor's Claim Is First Presented to the Personal Representative of the Deceased or Is Filed With the Clerk of the Court in Which the Proceedings Relative to the Estate of Such Deceased Person Are Pending.

Under the California law, subject to exceptions not pertinent here, no action may be maintained against an estate unless a creditor's claim is first filed with the clerk of the probate court in which the proceedings relative to the decedent's estate are pending or is presented to the personal representative of the decedent. (Prob. Code, Sec. 716;¹⁹ *Walton v. Kern*, 39 Cal. App. 2d 32, 102 P. 2d 531.)

This action was commenced on June 2, 1958. [R. 119.] Not until June 11, 1958 did plaintiff present a creditor's claim based upon the facts alleged in his complaint to the Bank as executor. [R. 9, par. 8.] Plaintiff's action was, therefore, prematurely commenced.

¹⁹"No holder of a claim against an estate shall maintain an action thereon, unless the claim is first filed with the clerk or presented to the executor or administrator, except in the following case: An action may be brought by the holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless the claim was filed or presented as aforesaid." (Prob. Code, Sec. 716.)

Conclusion.

Appellees submit that the appeal is without merit. No genuine issue as to any material fact exists. There was no contract between Reliance Steel and Neilan, or either of them, on the one hand, and plaintiff, on the other. No valid and enforceable contract of purchase and sale covering the assets of Reliance Steel was ever made. Plaintiff actively negotiated for the sale of the assets of Reliance Steel within the State of California while unlicensed. No actionable claim existed against the Bank as executor prior to the commencement of this action.

It is, therefore, respectfully submitted that the judgment of the district court dismissing the action should be affirmed.

June 19, 1959.

LAWLER, FELIX & HALL,
WILLIAM T. COFFIN,
ROBERT HENIGSON,

*Attorneys for Appellees, Reliance Steel &
Aluminum Co. and Security-First Na-
tional Bank, as Executor of the Will of
Thomas J. Neilan, Deceased.*

No. 16,358

IN THE

**United States Court of Appeals
for the Ninth Circuit**

HARRY H. MEISNER,

Appellant,

vs.

RELIANCE STEEL & ALUMINUM CO.,

a Corporation, and

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,

Executor of the Estate of Thomas J. Neilan, Deceased,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION

APPELLANT'S REPLY BRIEF

HARRY H. MEISNER,

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IN THE
**United States Court of Appeals
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No. 16,358

HARRY H. MEISNER,
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vs.

RELIANCE STEEL & ALUMINUM CO.,
a Corporation, and
SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,
Executor of the Estate of Thomas J. Neilan, Deceased,
Appellee

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION**

APPELLANT'S REPLY BRIEF

There is none so blind as the man *who does not wish to see.*

Appellees claim their perusal of the records and briefs discloses no issues to be tried, leaving us to wonder if they would recognize an issue if one came up and bit them.

Can they read appellant's brief and still believe that the parties are in agreement on the facts in the case.

Do they, for instance, concede plaintiff's contention (Brief 10) that he had a commission agreement with the defendants for finding a purchaser for Reliance's assets. If not, there is an issue.

Do they concede (Brief 10) that plaintiff's half of the commission was to be paid to him direct. If not, there is an issue.

Do they concede (Brief 11) that plaintiff found a ready, willing and able purchaser. If not, there is an issue.

Do they concede that the proposed terms of sale were agreeable to defendants. We trust they do, because this was admitted in their Response No. 4 (R. 45). But if not, there is an issue.

Do they concede that the purchaser was willing and able to perform the purchase on the terms of Exhibit A. In this regard they stated (Response 6, R. 46) their lack of information to admit or deny; but assuming they do deny, there is an issue.

And finally, do they concede (Brief 13) that after Mr. Neilan's death they were unwilling to go through with the sale, although the purchaser remained ready and willing to complete the purchase. If not, there is an issue.

And we challenge defendants to show anywhere in the record, in the pleadings, in the interrogatories, in responses to requests for admission, in the affidavits, or by neglect to make denials, that plaintiff and appellant has in any degree abandoned, or weakened his position on the above contentions.

We fear that the appellees are weaving a very thin web to try to obscure the real and disputed issues in this lawsuit. But perhaps we are misjudging appellees; perhaps they are merely quibbling about the meaning of the word "issue". If so, we submit the following definition taken from *Donahue v. Susquehanna Collieries Company*, 133 Federal 2nd page 3—that "an issue is a material point affirmed by one party and denied by the other".

The primary issue is the question, did the defendants agree to pay plaintiff one half of a commission of 5% of the first million and 2½% of the excess of the net purchase price for the inventory and assets covered by the purchase and sales agreement with H. W. & G. Corporation. If they did not, then what was the purpose of the wording, "This will confirm our understanding", which Mr. Neilan used to begin the letter, Exhibit J (R. 90) which he prepared for Meisner's signature and addressed to himself—the letter which was enclosed in his letter, Exhibit J (R. 89). If there was no such agreement, how could Mr. Meisner confirm the understanding: and if, as contended by the defendants, the only commission agreement was between the defendants and Jack Moore, why was it necessary for Meisner to sign the letter at all, why did they not just make their agreement with Mr. Moore himself. If it was Mr. Moore's commission, how could Meisner agree to cut it in half; or why should it be made payable directly to Mr. Meisner instead of to Mr. Moore. The only possible explanation for Mr. Neilan's preparation of Exhibit J was that he was evidencing a direct relationship between the defendants and plaintiff Harry H. Meisner. Mr. Neilan's signature to the letter dated November 12th, 1957 (Exhibit H) enclosing and referring to the letter, Exhibit J, which he prepared for Meisner's signature and which fully outlined the terms of the commission

agreement, would be sufficient to comply with the California Statute of Frauds.

Straus v. DeYoung, U. S. D. C.-S. D. Cal. 1957
155 Fed. Supplement 215;
Searles v. Gonzales, 19 Cal. 426; 216 P. 1003;
Hayden Company v. Rubber Company, 84 Cal.
App. 669; 258 P. 663;
Kennedy v. Mericnel, 8 Cal. App. 378; 97 P. 81.

Appellees have made no attempt to answer plaintiff's contention that by their refusal to go through with the sale the appellees have waived the condition regarding consummation of the sale. We therefore assume that they did not desire to controvert this point.

In their brief appellees argue that Exhibit B might not be enforceable against them. But we fail to see the importance of this objection as long as the purchasers remained willing to perform.

For all of these reasons, we believe that the action of the District Court in entering the summary judgment was erroneous and should be reversed.

Respectfully submitted,

HARRY H. MEISNER,
Plaintiff and Appellant, appearing in
Propria Persona,
2233 National Bank Building,
Detroit 26, Michigan.

United States Court of Appeals
FOR THE NINTH CIRCUIT

ALFONSO ESPINOZA COVARRUBIAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for
the Southern District of California
Southern Division

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FILED

MAY - 4 1959

PAUL P. O'BRIEN, CLERK

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No. 16361

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALFONSO ESPINOZA COVARRUBIAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

I

STATEMENT OF FACTS

On May 8, 1958, an indictment was returned by the United States Grand Jury, Southern District of California, Southern Division, charging appellant Alfonso Espinoza Covarrubias and Rachel Lopez Ybarra Covarrubias with smuggling of 9-1/2 pounds of marijuana

into the United States from Mexico at the Port of San Ysidro, California, in violation of 21 U.S.C. 176(a) (Cl. Tr., p. 2). On May 19, 1958, the appellant and defendant Rachel Covarrubias were arraigned in the United States District Court, Southern District of California, Southern Division, at San Diego, California, and entered pleas of not guilty (Cl. Tr. p. 4). The matter came on for trial on June 29, 1958, before the Honorable William G. East. Defendant Rachel Covarrubias changed her plea to that of guilty. The trial of appellant was commenced on that date (Cl. Tr. p. 7). At the close of the Government's case, appellant made a motion for Judgment of Acquittal (Cl. Tr. p. 8, Rep. Tr. p. 42, 43). The motion was denied (Cl. Tr. p. 8, Rep. Tr. p. 50). On July 30, 1958, before submission of the case to the jury, appellant again made a motion for Judgment of Acquittal. The motion was denied (Cl. Tr. p. 9, Rep. Tr. p. 63). On July 30, 1958, appellant was found guilty (Cl. Tr. p. 11). Appellant was sentenced to the custody of the Attorney General for a period of five years (Cl. Tr. 12).

On August 4, 1958, appellant filed a motion for Judgment of Acquittal and in the alternative for a New Trial (Cl. Tr. p. 14). On August 15, 1958, the motion for judgment of acquittal and in the alternative for a new trial was heard by the court. On August 18, 1958, the court orally denied said motion (Motion for New Trial, Tr. pp. 2-11). On September 11, 1958, the court entered a formal order denying the alternative motion (Cl. Tr. p. 18). Notice of Appeal was filed August 25, 1958 (Cl. Tr. p. 16, 17). Said appeal was from the Judgment of Conviction dated July 30, 1958. Supplemental Notice of Appeal was filed September 15, 1958. By the supplemental notice appellant appealed

from the Order denying the Alternative Motion (Cl. Tr. p. 21).

The evidence in the case was substantially as follows: Appellant returned to the United States from Mexico on March 29, 1958, in a 1955 Buick automobile (Rep. Tr. p. 6). Co-defendant, Rachel Covarrubias, appellant's wife, was with him (Rep. Tr. p. 7). Both declared that they were not bringing any merchandise back from Mexico (Rep. Tr. p. 7, 8). At the request of the Customs Inspector, appellant opened the trunk to the automobile. The trunk was locked and had to be opened with a key (Rep. Tr. p. 17). Appellant was directed to a secondary inspection point (Rep. Tr. p. 9). The car was on a Customs' lookout list. (Rep. Tr. p. 11). A second Customs Inspector removed the spare tire from the trunk of the automobile and let the air out. He rolled it slowly along the pavement. He "felt a small thud" (Rep. Tr. p. 23). He took the tire to a Standard gasoline station close by where the tire was removed from the wheel and certain white packages obtained therefrom (Rep. Tr. p. 24). These packages were marked Government's Exhibits 3, 4, 5 and 6. Samples were taken from these exhibits and sent to the United States Customs Chemist for analysis. Upon examination they were found to contain marijuana (Rep. Tr. p. 40, 41).

Appellant took the witness stand and testified substantially as follows: That he did not knowingly smuggle marijuana into the United States. His wife had access to and the use of his automobile. His wife's brother, one Fred Navarra, had access to and the use of his automobile (Rep. Tr. p. 54). On cross-

examination appellant testified that he arrived in Tijuana early in the morning on the 29th of March about 1:00 A. M. He left his wife and children at a hotel. From 1:00 A. M. to 6:00 A. M. he walked around and drove his automobile. He went to his brother's home in Tijuana about 6:00 A. M. in the morning. He remained at his brother's house about one hour. He had his automobile with him at that time. He and his brother then went back to the hotel in the automobile. His wife and brother left the hotel. Appellant went to sleep about 7:00 A. M. at the hotel and slept to 11:00 A. M. or noon. About 11:00 A. M. or 12:00 noon appellant's wife returned. Appellant went out to see his brother again but did not take the automobile. Appellant returned to the hotel about 2:00 or 3:00 in the afternoon. Appellant's wife was not at the hotel when he returned. She arrived back at the hotel about 4:00 P. M. Upon her arrival, appellant and his family got into the automobile and came back into the United States. The automobile is registered to appellant and his wife, defendant Rachel Covarrubias. After crossing the line appellant was arrested. He had \$16.00 with him at the time of his arrest. When he left his home at Stanton, California, he and his wife had \$138.00 (Rep. Tr. pp. 55-59). On redirect examination appellant testified that his wife was carrying the money when they went to Tijuana.

II

STATEMENT OF JURISDICTION

Reference is made to the first two paragraphs of the Statement of Facts, *supra*.

The indictment was returned pursuant to Rule 7 Federal rules of Criminal Procedure. San Ysidro, California, where the act was charged to have taken place, is within the Southern Division of the Southern District of California; thus the trial court had jurisdiction under Rule 18 of said Rules. This appeal was taken pursuant to Rule 37 of said Rules.

III

STATEMENT OF ISSUES

The questions involved are two.

1 - Is there sufficient evidence to support the verdict? It is the contention of Appellant that the circumstantial evidence of appellant's supposed knowledge of the presence of marijuana is insufficient to sustain the guilty verdict. This point was raised during the trial in the motion for Judgment of Acquittal at the close of the prosecution's case (Rep. Tr. pp. 42, 43), at the close of all the evidence (Rep. Tr. p. 63), and during the motion for new trial (Motion for New Trial pp. 2-11).

2 - Did the court err in sustaining the prosecution's objection to a question pertaining to the narcotics record of a person having access to the automobile in which the marijuana was found?

Appellant was asked who besides himself and his wife, had access and use of his automobile. He stated a brother of his wife, one Fred Navarra. He was asked "and has he been convicted of possession of narcotics?" The objection was sustained. (Rep.

Tr. p. 54).

The relevance of this question was discussed in detail during the motion for new trial (Motion for New Trial Tr. pp. 5, 6) as follows: "... I, in order to show, possibly, who could have had possession and control of the narcotics, asked on cross-examination, ..." (the above question.) "Now, I think that that deprived us of what some of these cases seem to indicate, that if the narcotics are found and if the person is found in close proximity to the narcotics, has had a narcotics conviction, that that is a circumstance tending to show his possession . . . so I think it was important, your Honor. And I think it may have been error to sustain that objection."

The foregoing specifications are the errors upon which the appellant relies.

IV

ARGUMENT

A. The circumstantial evidence of the appellant's supposed knowledge of the presence of the marijuana is insufficient to sustain the conviction.

In the instant case the government relies on the statutory presumption arising from possession (21 U.S.C. 176-a). We submit that there is insufficient evidence in the record to establish that appellant had possession of the marijuana, that is, that he knew of the presence of the marijuana and had control of it;

thus such presumption is not applicable. There can be no possession without knowledge.

Guevarà vs. U. S. (5 Cir.) 242 Fed. 2 745

Evans vs. U. S. (9 Cir.) 257 Fed. 2 121

U.S. vs. Tijerina (D.C. Tex) 138 Fed. Supp.

759

The circumstantial evidence in the case to establish knowledge and control is as follows: Appellant entered the United States from Mexico. He was driving a car owned by himself and his wife. The trunk compartment of the automobile was locked. The contraband was found in the spare tire which had been inside the trunk compartment. Besides appellant, two other persons had access to the automobile, which automobile was owned by appellant and his wife. In addition, the co-defendant, appellant's wife, pleaded guilty to the instant offense.

It is submitted that the foregoing evidence viewed in the light most favorable to the prosecution is not sufficient to establish knowledge. Appellant's wife, by her plea of guilty has admitted knowledge and possession of the marijuana. There is nothing in the evidence from which it may be reasonably inferred that appellant knew of the marijuana. Such inference could only arise from surmise, conjecture and speculation.

In Guevara vs. U. S. (5 Cir.) 242 Fed. 2 745, the defendant was charged with two counts under the Marijuana Tax Act. (26 U.S.C. 4744a). The defendant was convicted and the motion for judgment for acquittal following conviction was denied. The facts were substantially as follows:

A member of the police department of El Paso had seen defendant walking along the street and enter a hotel in El Paso, remain there ten minutes and come out. Defendant then met another man. The other man and defendant got into the front seat of an automobile which was not locked. The officer maintained surveillance of the two for three and a half blocks. Both persons were arrested. At the police station the car was searched. A package of 15 marijuana cigarettes was found on the floor under the seat in the middle of the car. Also a billy club was found under the seat. The defendant admitted ownership of the club but not the cigarettes. The other man was released. The Court of Appeals reversed the conviction. It was the opinion of the Court that it was just as reasonable that the cigarettes belonged to the other man as the defendant. "A jury must not be left to speculate and surmise in a criminal case, merely hoping that they are drawing the proper inference." (242 F. (2) 747).

In Rodrigues vs. U. S., 232 Fed. (2) 819, another Marijuana Tax Act case, defendant Rodriguez was charged with two counts. He was acquitted on the first count and convicted on the other. A co-defendant had plead guilty and accepted full responsibility for the marijuana referred to in the second count. The Court of Appeals reversed the conviction. It appeared that defendant led the agent to the marijuana only after the co-defendant had given instructions to the defendant in the presence of the agents as to where to find the marijuana. It was found on defendant's premises at the rear of the house. The court stated that conviction rested on "surmise and suspicion."

The Court stated:

"The authorities are clear that circumstantial evidence may, of course be sufficient to convict. Nevertheless, because of the fact that it is circumstantial and that a grave wrong may be done to an innocent man by reasoning from circumstances not sufficiently cogent in themselves or as connected, and particularly not sufficiently exclusive of every innocent hypothesis, the courts have been very sedulous to prevent an innocent man being found guilty where the evidence does not conform to acceptable standards. " (232 F. (2) 821).

See also U. S. vs. Maghinang (D.C. Del)
111 Fed. Supp. 760.

A late 9th Circuit Case, Evans vs. U. S. 257 F (2) 121, opinion by Justice Hamley, concerned the question of when knowledge of the presence of marijuana could be inferred from possession of the premises containing marijuana. The defendant in that case was charged with a violation of the Marijuana Tax Act (26 U.S.C. 4744a). The defendant was arrested pursuant to warrant at premises located on Broderick Street. Evidence pertaining to the third count was as follows: Search of the premises resulted in finding 22 grains of marijuana. The apartment was occupied by Evans' paramour, Mildred. It turned out that the apartment was hers and defendant stayed there only on occasion. Mildred denied ownership of the marijuana and Evans, under questioning, gave an equivocal answer. At the trial Evans testified that he did not know the marijuana was there. He was convicted on all counts. The Court of Appeals affirmed the conviction. However the court stated in discussing the evidence on

the third count that:

"Proof that one had exclusive control and dominion over property on or in which narcotics are found, is a potent circumstance tending to prove knowledge of the presence of such narcotics and control thereof..... Where one has exclusive possession of a home or apartment in which narcotics are found, it may be inferred even in the absence of other incriminating evidence that such person knew of the presence of narcotics and had control of them. But, since he was not in exclusive possession of the premises, it may not be inferred that he knew of the presence of narcotics and had control of them, unless there are other incriminating statements or circumstances tending to buttress such an inference." (257 F. (2) 128).

In the Evans case the Court of Appeals stated that there were such additional statements and circumstances - the implied admission and the disclaimer of Mildred at the time of the finding of the narcotics.

A California case, People vs. Antista (276 P. 2d. 177, 129 Cal. App. 2d 47), was relied on by the Court of Appeals in the Evans case. The facts in the Antista case were very similar to those of the Evans case. The paramour in the Antista case had previously been convicted of the use of narcotics. The Court discussed the cases where the possession of an automobile or apartment were not exclusive and stated that there must be some incriminating statement or circumstance in addition to the presence of the narcotics which indicated

knowledge of the defendant of its presence. Where this additional fact or circumstance is not established the prosecution has not established its case. Even though it be a fact that the Court disbelieves the defendant in his denial of knowledge of the presence of the marijuana, such fact does not supply the missing element.

"The burden was on the State to prove facts from which knowledge could thoroughly be inferred."

The Judgment in the Antista case was reversed.

In the instant case there is one possible additional circumstance: appellant was married to co-defendant Rachel Covarrubias who plead guilty to the charge. To make any inference of knowledge from this fact is not warranted. Guilt may not be inferred from association. Ong Way Jong vs. U. S. 245 Fed. 2, 392, 394. Nor may guilt be inferred from "relation".

In the instant case the appellant was not in exclusive possession of the automobile. Appellant's wife jointly owned the car and had access to the automobile. Also her brother had access to the automobile. We submit the evidence was insufficient.

B. The court erred in sustaining the objection to the question as to the narcotics record of a person having access to the automobile in which the marijuana was found.

The court sustained the objection to the question as

to the narcotics record of appellant's brother-in-law. Evidence as to who used the automobile is relevant and material. Evans vs. U.S. 257 Fed. (2) 121.

If appellant had had exclusive possession of the automobile, the government could establish that fact. Similarly, the defense is able to introduce evidence to show the possession was not exclusive.

Had appellant previously been convicted of a marijuana charge, even though not a felony, he could have been asked questions concerning this conviction to show his familiarity with marijuana (Stein vs. U. S., 166 Fed. (2) 851; Wright vs. U. S. 192 Fed. (2) 595). We think it only fair that where another person, who had access to the automobile, has familiarity with marijuana, that fact may also be shown.

In People vs. Antista, 276 P. 2d 177, 129 Cal. App. 2d 47, the California District Court of Appeal emphasized the fact that, where another person had access to an apartment or automobile and such person was addicted to or used narcotics, that is a circumstance which should be considered by the trier of fact.

CONCLUSION

In brief, the government's case is that appellant was in the non-exclusive possession of an automobile containing marijuana. No additional incriminating facts or circumstances appear to show appellant's knowledge of the presence of marijuana. Appellant may or may not have known of the presence of the marijuana. The evidence of the prosecution provides no

reasonable legal inference as to which situation is true. This being the posture of the evidence in this case, judgment should be reversed with directions to the trial court to grant a motion for judgment of acquittal.

Respectfully submitted,

HOWARD R. HARRIS
Attorney for Appellant

No. 16361

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALFONSO ESPINOZA COVARRUBIAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

LAUGHLIN E. WATERS,

United States Attorney,

ROBERT JOHN JENSEN,

Assistant United States Attorney,

Chief, Criminal Division,

PETER J. HUGHES,

Assistant United States Attorney,

600 Federal Building,

Los Angeles 12, California,

Attorneys for Appellee.

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JUN 22 1959

PAUL P. O'BRIEN, CLERK

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No. 16361

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALFONSO ESPINOZA COVARRUBIAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

I.

Jurisdictional Statement.

An Indictment was returned by the Federal Grand Jury for the Southern Division of the Southern District of California while sitting at San Diego, charging the defendant and another with a violation of Title 21, United States Code, Section 176(a). This Indictment was filed with the District Court on May 8, 1958. [Clk. Tr. pp. 2-3.]

Jurisdiction of the District Court is found in Section 3231 of Title 18, United States Code. Thereafter, trial by jury was had and a verdict of guilty returned on July 30, 1958. Immediately after return of the verdict the defendant was committed to the custody of the Attorney General for a period of five years. [Clk. Tr. pp. 11-13.]

On August 4, 1958, within five days of the conviction (Fed. Rules Crim. Proc., Rule 33) defendant moved the Court for acquittal and a new trial. [Clk. Tr. p. 14.] On August 18, 1958, defendant's Motion for Acquittal and a New Trial was denied [Rep. Tr. pp. 10-11]—however, a formal order was not entered until September 11, 1958. [Clk. Tr. p. 18.] On August 25, 1958, within ten days of the Court's denial of his motion for acquittal and a new trial, defendant filed a notice of appeal from the judgment of conviction and denial of his Motion for Acquittal and a New Trial. [Clk. Tr. pp. 16-17.] This Honorable Court, therefore, has jurisdiction of the cause under the provisions of Rules 37(a)(2) and 39 of the Federal Rules of Criminal Procedure and Section 1291 of Title 28, United States Code.

II.

Statement of Facts.

On March 29, 1958, defendant entered the United States from Tijuana, Mexico, at the port of San Ysidro, California. He was driving a 1955 Buick automobile. [Rep. Tr. p. 6.] This vehicle is registered to the defendant and his wife. [Rep. Tr. p. 58.] Upon being interrogated the defendant stated that he was bringing no merchandise from Mexico. [Rep. Tr. p. 7.] After making this declaration the defendant was asked to open the trunk of the vehicle [Rep. Tr. p. 8] and the trunk was opened by the defendant with the use of a key which he produced. [Rep. Tr. p. 17.] The automobile was on a "look out list" [Rep. Tr. p. 11] which is in effect a request that certain specified vehicles be given a detailed search. [Rep. Tr. p. 14.] The defendant and the vehicle were, therefore, directed to a secondary inspection area. [Rep. Tr. p. 9.]

At this inspection area the spare tire was removed from the trunk of the automobile. [Rep. Tr. p. 23.] Subsequently four packages were removed from the spare tire and eventually found to contain approximately nine and one-half pounds of marihuana. [Rep. Tr. pp. 33-35, 40-41.] The only evidence offered on behalf of the defendant was his own testimony. [Rep. Tr. pp. 54-60.] The defendant denied knowing anything about the marihuana. On cross-examination he admitted that he had driven the vehicle to Mexico in the early morning hours of March 29, 1958. At no time did he testify that anyone other than himself drove the vehicle in Mexico.

III.

Specification of Errors.

Appellant has specified two errors:

1. The evidence of record is insufficient to support the verdict of guilty.
2. The Court erred in excluding evidence of a narcotics record of a third person.

IV.

Argument.

A. Evidence of Record Amply Supports the Verdict of the Jury Finding Defendant Guilty.

At the outset it should be noted the cases upon which appellant relies and those which will be cited by the appellee are concerned primarily with whether or not the evidence of record was sufficient to justify a finding that the defendant therein "possessed" narcotics. The instant case, however, is not one which presents simply a question of possession. (*Cf. Ketchum, et al. v. United States*, 259

F. 2d 434 (5th Cir., 1958).) We are here concerned with a case wherein a defendant is engaged in affirmative conduct with respect to the contraband. There is no question but that appellant physically imported marihuana into the United States from Mexico on March 29, 1958. The issue is whether the evidence of record is sufficient to support a finding that Mr. Covarrubias had knowledge of the marihuana in the trunk of his vehicle when he crossed the international boundary. As noted before, the cases generally speak in terms of "possession." Actually these decisions deal with the sufficiency of the evidence to establish knowledge of the presence of contraband. Knowledge of the presence of narcotics, like any other fact, may be proved by circumstantial evidence. (*Evans et al. v. United States*, 257 F. 2d 121, 128 (9th Cir., 1958).)

Turning now to the cases cited by appellant in his Brief, it is respectfully submitted that each of these authorities is easily distinguished from the facts involved in the instant appeal.

People v. Antista, 129 Cal. App. 2d 47, 276 P. 2d 177 (1954), involved a case where the defendant was not even present at the time officers entered his premises which at that time were occupied by his paramour and the other person. Marihuana was found in an unused room and in an ashtray, both places being readily accessible to the other persons present.

Guevara v. United States, 242 F. 2d 745 (5th Cir., 1957), was a case where a small amount of marihuana was found under the front seat of a vehicle in which the defendant and another person had been riding. The Appellate Court in holding the evidence insufficient noted

that the contraband was in a position such that either occupant could have placed the marihuana under the seat.

United States v. Tijerina, 138 Fed. Supp. 759 (D. C. Texas), involved a case where $\frac{3}{4}$ pound of marihuana was found concealed in the bumper of a vehicle occupied by three defendants.

It is patently obvious that the foregoing cases are easily distinguished from that involving Mr. Covarrubias where a large quantity of marihuana was found in the spare tire of his vehicle and the tire was contained in a locked trunk for which Mr. Covarrubias produced the key.

United States v. Maghinang, 111 Fed. Supp. 760 (D. C. Del.), involved a defendant who was driving a vehicle borrowed from another person, not one registered to himself. In the *Maghinang* case, as in other cases relied on by appellant, the contraband was secreted under the dashboard, a place easily accessible to persons other than the defendant and one to which access could be gained without a key.

On Way Jong v. United States, 245 F. 2d 392 (9th Cir., 1957), involved a case where the only evidence connecting the defendant with narcotics was that a co-defendant who was dealing with an undercover agent frequently contacted the defendant On Way Jong.

Rodrigues v. United States, 232 F. 2d 819 (5th Cir., 1956), also involved a situation in which marihuana was found on the defendant's premises but in a place readily accessible to others. Other evidentiary matters in the *Rodrigues* case obviously indicate that it is not in point.

The Court's attention is invited to the following authorities wherein verdicts of guilty were upheld and which

illustrate the correctness of the result reached in the trial of appellant.

Rosenberg, et al. v. United States, 13 F. 2d 369 (9th Cir., 1926);

Mullaney v. United States, 82 F. 2d 638 (9th Cir., 1936);

Borgfeldt v. United States, 67 F. 2d 967 (9th Cir., 1933);

United States v. Johnson, 260 F. 2d 508 (7th Cir., 1958);

Ketchum, et al. v. United States, supra;

Bellah v. United States, 256 F. 2d 958 (5th Cir., 1958).

It is submitted that the sufficiency of the evidence in the instant case is most accurately analyzed with reference to the recent decision of this Honorable Court in *Evans et al. v. United States, supra*. The opinion, although dealing with the question of possession, notes that knowledge of the presence of narcotics may be proved by circumstantial evidence and that exclusive access to the place in which the contraband is found gives rise to a permissive inference that the person having such exclusive access knew of the presence of the contraband. The opinion further notes that, absent a showing of exclusive access, additional circumstances must be proved to justify an inference of knowledge.

An examination of the record in the instant case is consistent with only one conclusion and that is that appellant Alfonso Covarrubias had exclusive access to the trunk of the vehicle where the marihuana was found. The record reflects that the trunk where the marihuana was contained was locked, and it was appellant who pro-

duced the key to this locked trunk. Appellant argues in effect that this conclusion is weakened by the fact Mrs. Covarrubias entered a plea of guilty to the charge. It should be noted that this was not a matter brought before the jury and appellant's wife was not called as a witness on his behalf. In any event the fact that another person may also be guilty of the offense in no way impinges upon appellant's guilt. The type of offense involved in the instant appeal is not one which is inconsistent with participation by more than one person.

See:

United States v. Cohen, 124 F. 2d 164 (2d Cir., 1941), cert. den. 315, 811;

Brown v. United States, 222 F. 2d 293 (9th Cir., 1955);

Henry v. United States, 215 F. 2d 639 (9th Cir., 1954).

It should be pointed out that the foregoing observation in no way weakens the argument of appellee concerning appellant's having exclusive access to the trunk. This is illustrated by the following hypothetical situation: If appellant's wife purchased the marihuana in Mexico and then delivered the contraband to appellant, who, in turn, placed it in the trunk of the vehicle to which he alone had a key, his exclusive access to the place where the contraband was found would support an inference of knowledge on his part under the *Evans* case, *supra*, even though his wife were, in fact, equally guilty of the smuggling venture.

Assuming *arguendo* that there was an insufficient showing of exclusive access to the trunk by appellant, it is submitted that additional circumstances present amply justified a conclusion that appellant knew of the mari-

huana contained in the trunk. The contraband was found in the spare tire of a vehicle registered to appellant, which he was driving and for which a lookout had been posted. There is no evidence that anyone other than appellant used the vehicle during the fifteen hours it was in Tijuana, Mexico, a place which this Honorable Court may judicially notice is a prime source for contraband which is smuggled into the United States. (See: *Blackford v. United States*, 247 F. 2d 745, 752 (9th Cir., 1957), cert, den. 356 U. S. 914; *Carroll v. United States*, 267 U. S. 132, 160.) These factors plus the very amount of contraband involved, nine and one-half pounds of marihuana, amply supported a finding that appellant knew about the marihuana in the trunk of his car.

B. No Error Resulted From the Trial Court's Exclusion of Evidence Concerning the Narcotics Record of a Third Person.

Counsel for Appellee has been unable to find authorities directly in point concerning admissibility of offenses or misconduct by third persons not directly involved in a criminal prosecution. Generally, this problem has arisen in homicide cases wherein motive of a third person or some relationship between the third person and the decedent might have been relevant. (See Wigmore on Evidence (3d Ed., 1940), Sec. 139, pp. 573, *et seq.*; 121 A. L. R. 1362.)

Even in this situation the decisions are not in accord as is illustrated by the foregoing citations. Those cases which have held such evidence relevant involve a fact situation wherein proof that someone other than the defendant was the killer necessarily precluded the defendant's guilt. As noted before, the type of offense involved in the instant appeal is consistent with participation by other

persons in addition to the defendant. (See *Henry v. United States, supra*; *United States v. Cohen, supra*; *Brown v. United States, supra*.)

Appellant relies primarily on the case of *People v. Antista, supra*, which discussed the sufficiency of the evidence against the defendant and in finding the record lacking noted that marihuana was found on the defendant's premises where a paramour who had a narcotics record was present at the time the contraband was discovered. In the instant case there is nothing to indicate that Appellant's brother-in-law, whose narcotics conviction Appellant wished to bring before the jury, was in any way involved in the trip to Mexico nor does the record indicate how long it had been since Mr. Covarrubias' brother-in-law used the automobile nor whether or not the brother-in-law had access to the trunk. At the time the Government's objection to the brother-in-law's narcotics record was sustained, the record was as follows:

“Q. Mr. Covarrubias, on or about March 29th, 1958, did you knowingly smuggle marijuana into the United States? A. No.

Q. And does anyone else have access and use your automobile? A. My wife.

Q. Anyone other than your wife? A. A brother of my wife.

Q. And is his name Fred Navarra? A. Yes.

Q. And has he been convicted of possession of narcotics?

Mr. Hughes: Objection, your Honor. That's immaterial.

The Court: It will be sustained.” [Rep. Tr. p. 54.]

Since at the time the question concerning Fred Navarra's narcotics record was put, there was nothing to indicate that he was in any way involved in Appellant's trip to Mexico, it is submitted that at least at that point in the record such inquiry was wholly irrelevant, Common sense compels that we reject any inference that the marihuana was placed in the trunk of the vehicle at some unknown previous date and innocently transported to Mexico on the early morning of March 29. The amount of marihuana involved and the fact Tijuana is a known source of marihuana in large quantities compels that any such line of reasoning be rejected. This being so, whether a third person who had "access" to Appellant's vehicle had been convicted of a narcotics offense in the past would be wholly irrelevant and immaterial.

Assuming *arguendo* that in retrospect it may be said that Fred Navarra's narcotics record might have had some slight relevancy, it was to say the most extremely remote. Exclusion of such evidence is a matter for the trial judge's sound discretion and his decision should not be reversed, absent a clear abuse of such discretion.

"The trial judge possess wide latitude in the determination of the relevancy or materiality of evidence and his ruling cannot be reversed in the absence of an abuse of discretion." (*Wilson v. United States*, 250 F. 2d 312, 325 (9th Cir., 1957).)

United States v. Socony-Vacuum Company, 310 U. S. 150, 230 (1940), reh. den. 310 U. S. 658.

In light of the record at the time the question concerning Fred Navarra's narcotics record was put, it is obvious that sustaining an objection to the relevancy of such inquiry would not constitute an abuse of discretion requiring reversal of the conviction.

V.

Conclusion.

For the foregoing reasons it is respectfully submitted that the finding of guilty in the Court below should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
*Assistant United States Attorney,
Chief, Criminal Division,*

PETER J. HUGHES,
*Assistant United States Attorney,
Attorneys for Appellee.*



No. 16366 ✓

United States
Court of Appeals
for the Ninth Circuit

JOHN L. OWEN,

Appellant,

vs.

SEARS, ROEBUCK AND COMPANY, a Corporation,

Appellee.

Transcript of Record

In Two Volumes

Appeal from the United States District Court
for the District of Oregon.

FILED
APR -1 1959
PAUL P. O'BBIEN, CLERK

No. 16366

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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For Appellant.

KOERNER, YOUNG, McCOLLOCH & DEZEN-
DORF,
JOHN GORDON GEARIN,
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Portland 4, Oregon,
For Appellee.

In the United States District Court
for the District of Oregon

Civil No. 9195

JOHN L. OWEN,

Plaintiff,

vs.

SEARS ROEBUCK AND COMPANY, a Corpo-
ration,

Defendant.

AMENDED COMPLAINT FOR DAMAGES
FOR PERSONAL INJURIES

Comes now the plaintiff and for cause of action
against the defendant alleges as follows:

I.

That the defendant is and at all times herein
mentioned was a corporation duly organized and
existing under the laws of the State of New York,
with an office and principal place of business in
the City of Portland, County of Multnomah, State
of Oregon, and was and is engaged generally in
the retail department store business, and owned
and operated a retail store at 524 N.E. Grand Ave-
nue, Portland, Multnomah County, Oregon.

II.

That in the month of May, 1955, plaintiff bought
from defendant at defendant's said store a sport
shirt, bearing the name "Pilgrim," and paid de-
fendant \$2.98 therefor. That defendant then and

there warranted said shirt to be in all respects fit and proper for use as an item of wearing apparel; that plaintiff relied upon said warranty and was induced thereby to purchase said shirt.

III.

That said shirt was made of a highly flammable type of cloth, which fact was unknown to plaintiff, and was known or should have been known by defendant, and by reason of this flammability, said shirt was not fit for use as wearing apparel.

IV.

That plaintiff, while wearing the said shirt, on July 15, 1955, came in close proximity to an open flame and the said shirt became ignited. That immediately thereafter the flames spread over the whole surface of said shirt causing plaintiff's skin to be burned on his arms and about the trunk of his body.

V.

That as a result of said ignition of this said shirt, plaintiff suffered shock, excruciating pain and mental anguish; that plaintiff's skin at the places where he was burned, has become extremely sensitive and tender to the application and touch of all matter of thing and substance; ugly, red, permanent scars about the trunk and arms of the body; that these said injuries are permanent; that because of these premises, plaintiff has been damaged in the sum of \$40,000.00 general damages.

VI.

That all of the aforesaid was within the contemplation of the parties hereto at the time of the purchase of said shirt as a direct and natural result of any breach of warranty thereon.

VII.

That plaintiff has incurred as a direct result of said breach of warranty wage losses in the sum of \$740.00, and doctor and medical bills in the sum of \$637.00, all to his special damage in the total sum of \$1,377.00.

Wherefore, plaintiff prays for judgment against the defendant for \$40,000.00 general damages, \$1,377.00 special damages, and for his costs herein.

NICHOLAS GRANET,

/s/ N. GRANET,

Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed September 1, 1957.

[Title of District Court and Cause.]

ANSWER

Comes now defendant and for answer to plaintiff's complaint, alleges:

First Defense

Plaintiff's complaint fails to state a claim upon which relief can be granted.

Second Defense

Plaintiff's complaint fails to allege facts conferring jurisdiction upon this Court, and, therefore, this Court has no jurisdiction over this action.

Third Defense

Defendant denies each and every allegation of plaintiff's complaint and the whole thereof, except defendant admits Paragraph I of said complaint.

Fourth Defense

The sole, proximate, contributing or concurring cause of plaintiff's injury and damage, if any, was his own contributory negligence.

Wherefore, having fully answered plaintiff's complaint, defendant demands judgment.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

JOHN GORDON GEARIN,

/s/ JOSEPH LARKIN,

Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed June 18, 1957.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated between the parties that the Answer heretofore interposed by defendant

might stand as and for the Answer to the Amended Complaint herein.

Dated this 5th, day of September, 1957.

/s/ NICHOLAS GRANET,
Attorney for Plaintiff.

/s/ JOHN GORDON GEARIN,
Of Attorneys for Defendant.

[Endorsed]: Filed September 9, 1957.

[Title of District Court and Cause.]

PRETRIAL ORDER

The above-entitled cause came on regularly for pretrial conference before the undersigned judge of the above-entitled court on March 17, 1958. Plaintiff appeared by Nicholas Granet, his attorney. Defendant appeared by John Gordon Gearin, of its attorneys.

The parties, with the approval of the court, agreed to the following:

Statement of Facts

Plaintiff is a citizen, resident and inhabitant of the State of Oregon. Defendant is a New York corporation. The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

Plaintiff's Contentions

Plaintiff contends:

I.

That in the month of May, 1955, plaintiff bought from defendant at defendant's said store a sport shirt, bearing the name "Pilgrim," and paid defendant \$2.98 therefor. That defendant then and there warranted said shirt to be in all respects fit and proper for use as an item of wearing apparel; that plaintiff relied upon said warranty and was induced thereby to purchase said shirt.

II.

That said shirt was made of a highly flammable type of cloth, which fact was unknown to plaintiff, and was known or should have been known by defendant, and by reason of this flammability, said shirt was not fit for use as wearing apparel.

III.

That plaintiff, while wearing the said shirt, on July 15, 1955, came in close proximity to an open flame and the said shirt became ignited. That immediately thereafter the flames spread over the whole surface of said shirt causing plaintiff's skin to be burned on his arms and about the trunk of his body.

IV.

That as a result of said ignition of this said shirt, plaintiff suffered shock, excruciating pain and mental anguish; that plaintiff's skin at the places where he was burned, has become extremely sensitive and tender to the application and touch of all matter of thing and substance; ugly, red, permanent

scars about the trunk and arms of the body; that these said injuries are permanent; that because of these premises, plaintiff has been damaged in the sum of \$40,000.00 general damages.

V.

That all of the aforesaid was within the contemplation of the parties hereto at the time of the purchase of said shirt as a direct and natural result of any breach of warranty thereon.

VI.

That plaintiff has incurred as a direct result of said breach of warranty wage losses in the sum of \$740.00, and doctor and medical bills in the sum of \$637.00, all to his special damage in the total sum of \$1,377.00.

* * *

Defendant denies the foregoing contentions of plaintiff.

Issues to Be Determined

1. Did plaintiff purchase a shirt from the defendant?
2. If so, was the shirt which plaintiff purchased of highly flammable type and by reason thereof, not fit for use as wearing apparel?
3. Did the defendant breach its warranty of fitness for purpose?
4. Did plaintiff receive injuries as a direct and proximate result of defendant's breach of warranty?

5. If so, what is the amount of plaintiff's damage?

Jury Trial

Plaintiff made timely request for trial by jury.

Physical Exhibits

Certain physical exhibits have been identified and received as pretrial exhibits, the parties agreeing, with the approval of the court, that no further identification of exhibits is necessary. In the event that said exhibits, or any thereof, should be offered in evidence at the time of trial, said exhibits are to be subject to objection only on the grounds of relevancy, competency and materiality.

Plaintiff's Exhibits

1. Pilgrim shirt (defendant does not waive the identification of this exhibit).
2. A, B, C pictures.
3. Medical records.
4. X-rays (if taken).

Defendant's Exhibits

5. Three shirts of same lot number as the shirt allegedly purchased by plaintiff and made from the same material.
6. Medical reports.
7. Photographs.
8. Deposition of Mabel Constance Owen.
9. Deposition of John L. Owen.

10. Letter from Granet & Gray to Dan River Mills, Incorporated, dated December 31, 1956.

The parties hereto agree to the foregoing pretrial order and the court being fully advised in the premises,

Now Orders that the foregoing pretrial order shall not be amended except by consent of both parties, or to prevent manifest injustice; and it is further

Ordered that the pretrial order supersedes all pleadings; and it is further

Ordered that upon trial of this cause no proof shall be required as to matters of fact hereinabove specifically found to be admitted, but that proof upon the issues of fact (and law) between plaintiff and defendant as hereinabove stated shall be had.

Dated at Portland, Oregon, this 30th day of September, 1958.

/s/ WILLIAM G. EAST,

United States District Judge.

Approved:

/s/ N. GRANET,

Attorney for Plaintiff.

/s/ JOHN GORDON GEARIN,

Of Attorneys for Defendant.

Lodged March 7, 1958.

[Endorsed]: Filed September 30, 1958.

[Title of District Court and Cause.]

VERDICT

We, the jury, duly impaneled and sworn to try the above-entitled case, do find our verdict in favor of defendant and against the plaintiff.

Dated this 30th day of Sept., 1958.

/s/ GLENN L. SWERINGER,
Foreman.

[Endorsed]: Filed September 30, 1958.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Comes now the plaintiff by his attorney, Nicholas Granet, and moves the above-entitled Court for an order granting the plaintiff a new trial on the ground of judicial error and that the Court, in allowing a motion for a directed verdict in favor of the defendant, stated that it was necessary for the plaintiff to show negligence in an action on an implied warranty of fitness of use of merchandise sold by a retailer to a consumer.

Plaintiff submits that in an action based upon implied warranty of fitness proof of negligence is unnecessary for recovery in such an action and the plaintiff respectfully cites the recent decision of:

“Michael Blessington, Admr., etc., of Michael Blessington, Jr., Deceased, v. McCrory Stores Corporation, et al. (Two cases.) New York Court of Appeals—March 5, 1953 (305 NY 140, 111 NE 2d 421, 37 ALR 698).”

(Attached hereto and made a part hereof, is a photostatic copy of said citation from 37 ALR 2d.)

Based upon the above, plaintiff respectfully moves the Court for an order granting a new trial on the ground of judicial error.

Dated this 2nd day of October, 1958.

/s/ N. GRANET,

Attorney for Plaintiff.

[Endorsed]: Filed October 2, 1958.

[Title of District Court and Cause.]

ORDER

This matter came on for hearing upon the plaintiff's motion for the Court's order granting a new trial in the above-entitled cause.

It appears from the records and files of the cause that the Court ordered a directed verdict in favor of the defendant at the close of plaintiff's case in chief. The theory upon which the plaintiff advanced was that of a breach of warranty in the sale of a

chattel by defendant and, after hearing the statements and arguments of counsel, the Court observed:

“Now, the question is here we are dealing purely with a breach of contract. The plaintiff’s evidence is that the garment was purchased from the defendant. The evidence then shows that in the course of lighting the cigarette his shirt burned. I see absolutely nothing that shows that the garment was not constructed, did not represent all that it was warranted to be. So, I am forced to grant the motion.”

The Court, having reconsidered the matter, is of the same opinion, and

Therefore, It Is Ordered that plaintiff’s motion for a new trial in the above-entitled cause be and the same is hereby denied.

Dated October 24, 1958.

/s/ WILLIAM G. EAST,

United States District Judge.

[Endorsed]: Filed October 24, 1958.

[Title of District Court and Cause.]

MOTION

Comes now the plaintiff and pursuant to Rule 60 (a) of the Rules of Civil Procedure, moves the Court for entry of judgment nunc pro tunc as of September 30, 1958, upon the grounds and for the reason that upon said date the Court, sitting with a jury,

directed a verdict in favor of the defendant but a judgment was not entered thereon.

NICHOLAS GRANET,

By /s/ RALPH W. DUNCANSON,
Of Attorney for Plaintiff.

ORDER

It Is So Ordered.

Dated this 7th day of Nov., 1958.

/s/ WILLIAM G. EAST,
Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 10, 1958.

In the United States District Court
for the District of Oregon

Civil No. 9195

JOHN L. OWEN,

Plaintiff,

vs.

SEARS, ROEBUCK AND CO., a Corporation,
Defendant.

JUDGMENT

This cause having come on regularly for trial before the above-entitled Court, sitting with a jury,

and the evidence on the part of the plaintiff having been presented herein, and the Court having thereupon on motion of the defendant, directed a verdict for the defendant and against the plaintiff, and the jury having returned its verdict accordingly and the same having been received and entered; it is, therefore,

Hereby Ordered and Adjudged that plaintiff take nothing by his action and that the defendant have judgment against the plaintiff for his costs and disbursements incurred herein, taxed at \$63.05.

Dated this 7th day of Nov., 1958.

/s/ WILLIAM G. EAST,
Judge.

[Endorsed]: Filed November 10, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Sears, Roebuck and Co., a corporation, and to Koerner, Young, McCollock & Dezendorf (John Gordon Gearin), its attorneys:

You are hereby given notice that the plaintiff appeals to the United States Court of Appeals for the Ninth Circuit from that certain judgment entered herein on or about the 30th day of September, 1958, and the whole thereof.

Dated this 18th day of November, 1958.

NICHOLAS GRANET,

By /s/ RALPH W. DUNCANSON,
Of Attorneys for Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed November 18, 1958.

[Title of District Court and Cause.]

COSTS ON APPEAL BOND

Whereas, the Plaintiff in the above-entitled proceedings has appealed to the United States Court of Appeals for the 9th Circuit from that certain Judgment made, rendered and entered under date of September 12, 1958, in the above-entitled Court wherein a Judgment was entered upon a directed verdict for the Defendant, and said Plaintiff being aggrieved thereby and desiring to appeal said Judgment to the United States Court of Appeals for the 9th Circuit;

Now, Therefore, in consideration of the premises, we, John L. Owen, and the American Automobile Insurance Company, a Missouri Corporation, authorized to do business within the State of Oregon, do hereby jointly and severally undertake and promise on the part of the said Plaintiff-appellant that they will pay all costs and disbursements which may be awarded against them because of and on said

Appeal not to exceed the sum of Two Hundred Fifty and No One Hundredths (\$250.00) Dollars.

Signed, Sealed and Dated November 14, 1958.

/s/ JOHN L. OWEN,
Principal.

[Seal] AMERICAN AUTOMOBILE INSUR-
ANCE COMPANY,

By /s/ STANLEY P. DUYCK,
Attorney-in-Fact.

Countersigned:

/s/ C. R. RATHBUN,
Oregon Resident Agent.

[Endorsed]: Filed November 18, 1958.

In the United States District Court
for the District of Oregon

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Amended complaint for damages for personal injuries; Answer; Stipulation that answer heretofore interposed stand as answer to amended complaint; Pretrial order; Verdict; Motion for a new trial; Order deny-

ing motion for new trial; Motion for entry of judgment nunc pro tunc; Judgment; Notice of appeal; Costs on appeal bond; Designation of record on appeal; Motion and order extending time to docket appeal; Motion and order extending time to docket appeal; Statement of points; Supplemental designation of record on appeal and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 9195, in which John L. Owen is the plaintiff and appellant and Sears, Roebuck and Company, a corporation, is the defendant and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of proceedings, and two copies are being forwarded under separate cover.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 10th day of February, 1959.

[Seal]

R. DeMOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 16366. United States Court of Appeals for the Ninth Circuit. John L. Owen, Appellant, vs. Sears, Roebuck and Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: February 11, 1959.

Docketed: February 17, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16366

JOHN L. OWEN,

Appellant,

vs.

SEARS, ROEBUCK AND CO., a Corporation,

Respondent.

STATEMENT OF POINTS

Comes now the appellant and pursuant to Rule 17 (6) of this Court, files his Statement of Points as follows:

I.

That there was substantial evidence presented in the trial of this cause from which the jury could find that the respondent sold a garment which was not reasonably fit for the purpose intended.

II.

There was substantial evidence presented from which the jury could find that the garment in question was sold by the respondent to the appellant.

III.

Any requirement of notice of breach of warranty under the Uniform Sales Act (ORS 75.490) was satisfied by the appellant.

IV.

The respondent waived any requirement of notice of breach of warranty under the Uniform Sales Act (ORS 75.490).

V.

Appellant suffered substantial injuries as the approximate result of the sale and breach of the implied warranty of fitness by the respondent.

Respectfully submitted,

NICHOLAS GRANET,

By /s/ RALPH W. DUNCANSON,
Of Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 20, 1959.

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN L. OWEN,

Appellant,

v.

SEARS, ROEBUCK AND COMPANY,
a Corporation,

Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court
for the District of Oregon.*

NICHOLAS GRANET,
1007 Loyalty Building,
Portland 4, Oregon,
For Appellant.

KOERNER, YOUNG, MCCOLLOCH & DEZENDORF,
JOHN GORDON GEARIN,
800 Pacific Building,
Portland 4, Oregon,
For Appellee.

FILED

MAY - 1 1959

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United States
COURT OF APPEALS
for the Ninth Circuit

JOHN L. OWEN,

Appellant,

v.

SEARS, ROEBUCK AND COMPANY,
a Corporation,

Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court
for the District of Oregon.*

JURISDICTIONAL STATEMENT

This is an appeal by John L. Owen, plaintiff below, from a judgment entered by the United States District Court for the District of Oregon by direction for the defendant below (Tr. of Record 15).

The action below was commenced by a complaint filed by John L. Owen claiming damages in the sum of \$40,000.00 against Sears, Roebuck and Company, a corporation, for the breach of an implied warranty, by reason of which John L. Owen was permanently injured

(Tr. of Record 4-5). The plaintiff below was a citizen of the State of Oregon and the defendant below was a citizen of the State of New York (Tr. of Record 7).

The United States District Court for the District of Oregon had jurisdiction of this cause by virtue of USCA Title 28, Sec. 1332.

This Court has jurisdiction of this cause by virtue of USCA Title 28, Secs. 1291 and 1294.

STATEMENT OF THE CASE

On July 15, 1955, the appellant was wearing a sports shirt which had been purchased by his wife from the appellee. The shirt was of the pullover variety with short sleeves and two buttons at the neck. The shirt had been purchased about May of 1955 and had prior to the day in question been kept in a dresser drawer at home with other wearing apparel of the appellant. It was a cotton shirt and had a polished finish (Tr. 4-6).

On the day in question, the appellant's wife was working outside the home and the appellant was home, it being a Saturday, taking care of their children and doing light housework. He had completed the housework, took a bath and, in putting on clean clothes, chose the shirt in question.

The appellant sat down on the davenport and lighted a cigarette. It was a warm day and there was a breeze blowing through an open window immediately in front of the davenport upon which appellant was sitting. The appellant took a puff or two of the cigar-

ette and the shirt burst into flames, either because of contact with the match or the cigarette (Tr. 30). The appellant rushed to the bathroom while attempting to tear the shirt from his body. By the time the shirt was ripped off and the flames stomped out, there was nothing remaining of the shirt except the collar. Part of the shirt had stuck to his back and was still burning when he reached the bathroom. Appellant was also wearing an undershirt (T shirt) which likewise burned (Tr. 27). Appellant received burns upon his right chest and right underarm, as well as along his back. He put on another shirt, called a neighbor to care for his children and immediately sought medical attention (Tr. 8-10).

Appellant was confined to a hospital for a period of about three weeks, during which time he was given sedatives frequently for pain. After being discharged from the hospital, appellant was visited regularly by his doctor who would change the bandages and treat an infection which developed from the burns (Tr. 15-14). Scars from the burns were present and visible at the time of trial (Tr. 18).

Appellant's wife was an employee of appellee and she purchased the shirt in question from the appellee sometime in May of 1955. It was a cash sale and was purchased from the men's section of the department store (Tr. 40-45). She was not certain of the trade name of the garment, but she testified that it had a polished finish (Tr. 40-41). After she purchased the shirt, she put it in a drawer with the rest of his clothing. Appellant had not worn it before the day in question, nor had it been cleaned by appellant or anyone else. She testified

that she believes the original pins were still in the shirt up to the day of the accident (Tr. 44). All that remained of the shirt was a collar which was found in the bathroom the evening of the fire and which was thrown in the garbage (Tr. 45).

As noted above, appellant's wife purchased the shirt from the respondent because she was able to obtain an employee's discount. She personally purchased most of appellant's clothes at Sears for that reason, and she was so authorized to do by the appellant (Tr. 46, 58, 72). The garment in question was cotton, light in weight and had a smooth, glossy finish (Tr. 46).

Dr. David C. Frisch, a dermatologist, testified that he examined the appellant on the 17th day of April, 1958, for burn scars on the right side of his chest and right arm. Five by five inch scars were present on his upper arm, and on his lower arm they were of a size of about six by seven inches. They were superficial second degree and deep second degree burns and they were permanent (Tr. 51). Appellant suffered discomfort because of his inability to perspire in the scarred area and his discomfiture was likewise of a permanent nature (Tr. 55).

STATEMENT OF POINTS

1. There was substantial evidence presented in the trial of this cause from which the jury could find that the respondent sold a garment which was not reasonably fit for the purpose intended.

2. There was substantial evidence presented from which the jury could find that the garment in question was sold by the appellee to the appellant.

3. Any requirement of notice of breach of warranty under the Uniform Sales Act (Oregon Revised Statutes 75.490) was satisfied by the appellant.

4. The appellee waived any requirement of notice of breach of warranty under the Uniform Sales Act (Oregon Revised Statutes 75.490).

Point I

There was substantial evidence presented from which the jury could find that the appellee sold a garment which was not reasonably fit for the purpose intended.

Barrett v. S. S. Kresge Co., 31 Pa D & C 379;
 Blessington v. McCrory Stores Corporation, et al,
 305 NY 140, 111 NE 2d 421, 37 ALR 2d 698;
 Deffebach v. Lansburgh & Bro., 80 App D C 185,
 168 ALR 1052, 150 F2d 591;
 Jelleff, Inc. v. Branden, 233 F2d 671;
 Lohse v. Coffey, 32 A2d 258, 261;
 Ringstad, et ux, v. I. Magnin & Co (1952), 39
 Wash 2d 923, 239 P2d 848;
 Uniform Sales Act (ORS 75.150(1));
 Uniform Sales Act, (ORS 75.490).

ARGUMENT

At the conclusion of appellant's case, the trial court, in granting appellee's motion for a directed verdict stated:

"Now, the question is here we are dealing purely with a breach of contract. The plaintiff's evidence is that the garment was purchased from the defendant. The evidence then shows that in the course of

lighting the cigarette his shirt burned. I see absolutely nothing that shows that the garment was not constructed, did not represent all that it was warranted to be. So, I am forced to grant the motion."

The evidence is undisputed that the shirt being worn by the appellant burst into flames while he was lighting a cigarette and he was badly burned before he could tear the garment from his body (Tr. 9-10). Nothing remained of the shirt except the collar which was thrown into the garbage can by appellant's wife (Tr. 18). This being so, the court's holding was either a declaration that shirts commonly are made of material or treated with a substance which causes them to react as this garment did when coming into proximity with an open flame or the glow of a cigarette; or, was a finding as a matter of law that the appellant's testimony was completely unworthy of belief in the absence of proof of the construction of the garment and the manner in which it was treated. Neither position is tenable.

The Uniform Sales Act (Oregon Revised Statutes 75.150 (1)) provides:

"Where the buyer, expressly or by implication, makes known to the Seller that particular purpose for which the goods are required, and it appears that the buyer relies on the Seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

The case of *Deffebach v. Lansburgh & Br.*, 80 App D C 185, 168 ALR 1052, 150 F2d 591, leaves little doubt as to the inferences that may be drawn from testimony present in the instant case. The Deffebach

case was one where a chenille lounging robe was purchased from appellee's store. About the third or fourth time she wore it she was badly burned. The undisputed testimony was that she waived or "fanned" a match after lighting a cigarette, that the robe caught fire, and that the flame spread with great rapidity, "quicker than you snap your fingers almost," in spite of immediate and vigorous efforts of several persons to put it out. On appeal, it was conceded that the only question in the case was whether or not the garment was reasonably fit for use as a robe. The Court said:

"Since outer garments intended for domestic wear are not unlikely to come into momentary contact with lighted matches, tobacco, or stoves, it seems to us clear that a robe which, when this contact occurs, instantly bursts into flame and inflicts severe injury is unreasonably dangerous and unfit for use. Accordingly, we think the jury should have been instructed that if the robe caught fire and burned as the witness testified, there was a breach of appellee's implied warranty of fitness." (Reversed).

In *Jelleff, Inc. v. Branden*, 233 F2d 671, the appellee purchased a finger-tip or hip length "brunch" coat or smock from the appellant. She wore the garment only two or three times. On the day in question, she was preparing a meal and the smock came into contact with the outer ring or rings of the burner on her electric stove. The smock was buttoned down the front but hung in a flaring fashion. She first noticed the smock was afire when the flames reached her chest. The flames spread rapidly through the right half of the garment and, as she ran from the kitchen to the bathroom, various charred portions of the garment fell to the floor

and burned spots in the rug. Part of the garment fell into the tub and was thrown out by the janitor. The garment burned with such intensity that it melted or fused a buckle and the strap on her brassiere and burned the imprint of the strap into her back. "It went so fast that I couldn't get the canister down in time to bring down my arm to protect myself." The Court cited with approval their holding in the Deffebach case and, in affirming the verdict for plaintiff, held that the jury was justified in inferring that the garment was not reasonably suited for the purpose it was obviously intended.

Also see *Ringstad et ux v. I Magnin & Co.* (1952), 39 Wash 2d 923, 239 P2d 848; *Blessington v. McCrory Stores Corporation, et al*, 305 NY 140, 11 NE 2d 421, 37 ALR 2d 698.

The cases cited are squarely in point. The Deffebach case teaches us that if the garment comes into "momentary contact" with a lighted match or cigarette and it "bursts into flames," a jury would be justified in finding that the seller had breached his implied warranty of fitness. That case does not require the appellant to go further and establish by direct evidence the construction of the garment, if, and how, it may have been treated chemically, and its propensities when exposed to heat. Indeed, as in the Jelleff case, *supra*, the appellant could not have done so as the garment was completely destroyed by the flames, with the exception of the collar which was thrown out in the garbage.

As was said in *Lohse v. Coffey*, 32 A2d 258, 261:

"Here, where the claim rests upon the implied warranty, plaintiff needed to prove (as we have pointed out above) only that he suffered an injury as a result of a breach of such warranty; in other words, his case was easier to prove. For the purpose of this discussion there can be no question that he proved the injury. But did he prove the first element in the case—that the food was tainted? The fact that Monarch, who ate the same solids also became ill was evidence of such taint. His physicians testimony that if the food was tainted it 'was a competent producing cause' of the trouble, was also clearly acceptable proof. The two taken together supply a firm footing for the verdict. Nor is this basing inference upon inference, for the only element not proven factually (or by opinion evidence) was that the food was tainted. This the jury was entitled to infer from the other evidence.

"We do not say that plaintiff made out a perfect, unassailable case, or one which was proven to a scientific demonstration. Nor was he required to do so in order to get to the jury.

"Only the most litigious plaintiff would have had the presence of mind, in the throes of intermittent attacks of vomiting and diarrhea to arrange for laboratory tests and chemical analyses of his vomitus and excreta to be brought into court to prove his case. A man can hardly be expected to prepare a lawsuit while writhing on an ambulance stretcher or a hospital bed."

Obviously, the appellee in the instant case was in a much better position to know the type of garment it was retailing to the general public. This the trial court apparently recognized but ignored (Tr. 94). As was said in *Barrett v. S. S. Kresge Co.*, 31 Pa D & C 379, where the court held an implied warranty was present in the purchase of a dress which was impregnated with dye:

"We see no distinction in reasoning or principle between the present situation and the foodstuff cases, universally recognized as the subject of implied warranties of fitness for use for the purpose for which the materials or products are sold. Here are cheap garments manufactured and sold in lots of thousands. The manufacturer and retailers are obviously the only ones in a position to control and know the character and effect of the materials used in their manufacture, and no housewife can be expected to risk the chance of poisoning by a substance contained in an ordinary article of clothing designed and sold expressly for human wear."

Point II

There was substantial evidence presented from which the jury could find that the garment was sold by the appellee to the appellant.

Davis v. Van Camp Packing Co., 176 NW 382,
17 ALR 649;

Klein v. Duchess Sandwich Co., 14 Cal 2d 272,
933 P2d 799;

Shysky v. Drake Brothers Co., 192 App Div 186,
182 NY Supp 459;

ORS 75.150 (1);

Restatement, Agency, Vol I, Sec. 20;

Restatement, Agency, Vol I, Sec. 22.

ARGUMENT

A person who has capacity to affect his legal relations by the giving of consent has capacity to authorize an agent to act for him with the same effect as if he were to act in person. Restatement, Agency, Vol I, Sec. 20. A husband or wife may be authorized to act for the other party to the marital relationship. Restatement, Agency, Vol I, Sec. 22.

Thus, in the leading case of *Davis v. Van Camp Packing Co.*, 176 NW 382, 17 ALR 649, where an ultimate consumer was poisoned by eating canned pork and beans which he had purchased from a retailer who had bought the same from a jobber to whom the manufacturer had sold them, it was held that the manufacturer could be held liable upon the theory of implied warranty of wholesomeness, notwithstanding there was no privity of contract between the consumer and manufacturer. In reaching this conclusion the Court pointed out that manufacturers of food, especially of canned food, must exercise the highest degree of care; that the better rule is that the production and sale of an article of food carries an implied warranty that it is fit for human consumption, except, perhaps, where the contrary is observable; and, upon the question of implied warranty, the question as to privity as not controlling. (Accord: *Shysky v. Drake Brothers Co.*, 192 App Div 186, 182 NY Supp 459.)

And in *Klein v. Duchess Sandwich Co.*, 14 Cal 2d 272, 933 P2d 799, 140 ALR 246, under a statute which was identical with ORS 75.150 (1), that Court held that a proper jury question was presented upon evidence that a husband and wife stopped at a restaurant and the husband at the wife's direction procured a ham and cheese sandwich for her, which was wrapped in wax paper and sealed with metal clamps, delivered to the restaurant by the manufacturer about an hour before, upon eating part of which she discovered the presence of maggots and became acutely ill. The Court further held that there was sufficient privity of contract to support

the manufacturer's liability to the ultimate consumer upon the implied warranty as to the fitness of the food, that the statute did not contemplate only the existence of such a warranty running from an immediate seller to an immediate buyer, and that the intervention of a middleman, at least under such close circumstances, made no difference. And as to the contention that recovery was precluded because the wife was not the buyer within the meaning of the statute and that consequently there was no privity of contract between the seller and his wife, the Court observed that although the evidence showed that the wife "sent" the husband for the express purpose of purchasing the sandwich, thereby technically becoming the "buyer" within the terms of the statute, nevertheless no such technical privity of contract as was contended for was necessary in order to enable her to recover as an ultimate consumer, stating that:

"The warranty as to the fitness of foodstuff for human consumption was not intended to be solely for the immediate 'buyer', but was intended to be for the benefit of the ultimate consumer—the existence of privity of contract not being essential in an action brought by such consumer on the warranty theory. To allow a recovery by such third person, who may have consumed unwholesome food purchased by another, would not impose a greater burden on the manufacturer or on the immediate seller of the food than would be thus imposed if the original purchaser had been injured by reason of the consumption thereof—since the warranty extended to every consumer is that the food is fit for the purpose for which it was intended, namely for human consumption."

It would appear obvious to the appellant that the laws of agency and common sense would require a holding in the instant case that privity, if necessary, has been established between appellant and the appellee.

Point III

Any requirement of notice of breach of warranty under the Uniform Sales Act (ORS 74.490) was satisfied by the appellant.

Barni v. Kutner, 45 Del 550, 76 A2d 801;

Baum v. Murray (1945), 23 Wash 2d 890, 162 P2d 801;

Henderson Tire & Rubber Company v. P. K. Wilson & Son, 235 NY 489, 139 NE 583;

Kennedy v. F. W. Woolworth Co., 205 App Div 648, 200 NYS 121;

Maxwell Co. v. Southern Oregon Gas Corporation, 158 Or 168, 74 P2d 594;

Murphy Laboratories, Inc. v. Emery Industries, Inc., 95 F Supp 651;

Ringstad v. I Magnin & Co. (1952), 39 Wash 2d 923, 239 P2d 848;

Rogiers v. Gilchrist Co., 312 Mass 544, 45 NE 2d 744;

Silverstein v. R. H. Macy & Co. (1943), 266 App Div 5, 40 NYS 2d 916;

Sylvester v. R. H. Macy & Co., 265 App Div 999, 39 NYS 2d 1000;

Texas Motorcoaches v. A. C. F. Motors Co., 154 F2d 91;

Whitfield v. Jessup (1948), 31 Cal 2d 826, 193 P2d 1;

Oregon Revised Statutes 75.690 (1);

Oregon Revised Statutes 75.490;

Williston on Sales, Vol. III, Sec. 484.

ARGUMENT

One of the grounds urged by the appellee in his motion for a directed verdict was that the appellant's cause was fatal because of lack of reasonable notice of breach of warranty (Tr. 85).

Oregon Revised Statutes 75.690(1) provides:

"Where there is a breach of warranty by the seller, the buyer may, at his election (b) accept or keep the goods and maintain an action against the seller for damages for the breach of warranty * * * ."

Oregon Revised Statutes 75.490 provides:

"In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefore."

The act does not prescribe the form of any notice mentioned therein. *Whitfield v. Jessup* (1948), 31 Cal 2d 826, 193 P2d 1. Any notice required may be oral, *Baum v. Murray* (1945), 23 Wash 2d 890, 162 P2d 801; *Ringstad v. I. Magnin & Co.* (1952), 39 Wash 2d 923, 239 P2d 848. The commencement of the action itself affords sufficient notice of a breach of warranty under the Act. *Silverstein v. R. H. Macy & Co.* (1943), 266 App Div 5, 40 NYS 2d 916.

Likewise, the cases vary as to the substance of any notice required. Such notice should be "clear and unambiguous." *Texas Motorcoaches v. A. C. F. Motors*

Co., 154 F2d 91; it should be "unequivocal." *Murphy Laboratories, Inc. v. Emery Industries, Inc.*, 95 F. Supp 651; it should refer to particular sales and fairly advise the seller of the defects, *Rogiers v. Gilchrist Co.*, 312 Mass 544, 45 NE 2d 744; it should apprise the seller of the fact that the buyer is making a claim for damages or is asserting a violation of its rights, *Whitfield v. Jessup*, supra, *Barni v. Kutner*, 45 Del 550, A2d 801.

The nature of the case and its particular facts and circumstances are important in determining whether any requirement of notice has been satisfied. *Barni v. Kutner*, supra. Appellant contends that the reason for the rule has no application to the facts and circumstances of this case.

In *Silverstein v. R. H. Macy & Co.* (1943), 266 App Div 5, 40 NYS 2d 916, damages were sought for personal injuries sustained as a result of defendant's breach of warranty of a chinning bar and a new trial was ordered after plaintiff appealed from a judgment dismissing his complaint. One of defendant's contentions on appeal was the plaintiff had failed to plead or prove compliance with the Sales Act in respect to giving notice within a reasonable time. The Court held that such requirement had no application to a situation similar to that kind, citing *Kennedy v. F. W. Woolworth Co.*, 205 App Div 648, 200 NYS 121; and *Sylvester v. R. H. Macy & Co., Inc.*, 265 App Div 999, 39 NYS 2d 1000; also see *Maxwell v. Southern Oregon Gas Corporation*, 158 Or 168, 74 P2d 594.

In the *Kennedy* case, supra, damages were sought for injuries occasioned by the eating of candy purchased

from the defendant. That Court held that the complaint was sufficient irrespective of lack of notice; that the notice mentioned in the Sales Act had no relation to goods purchased for immediate human consumption and did not apply to the facts and circumstances of the case. The Court said the section requiring notice is relevant only in situations where there is a sale of goods whose inspection or use discloses a defect of quality, lack of conformance to sample, failure to comply with description, or other cognate circumstances, which causes money damage to the vendee. (Accord: *Maxwell Co. v. Southern Oregon Gas Corporation*, *supra*.)

The obvious intent of the Sales Act is to place upon the buyer the duty of inspecting the goods after title and possession has passed to him by his acceptance of them, and to give reasonable notice to the seller of any defect in quality, lack of conformance to sample or failure to comply with description. If such notice is given, the buyer may then return the goods or keep them and bring an action against the seller. Oregon Revised Statutes 75.690.

As stated in Williston on Sales, Vol. III, Sec. 484,

"A rule seems desirable which is capable of some certainty in its application and also on the one hand avoids the hardship on the buyer of holding that acceptance of delivery and the property in the goods necessarily deprives him of the seller's obligations, and on the other hand avoids the hardship on the seller of allowing a buyer at any time within the period of the statute of limitations to assert that the goods were defective, though no objection was made *when they were received*. With this in

mind the positive requirement of prompt notice was inserted in the statute.” (Italics supplied)

Assuming, arguendo, that the statute contemplates notice in all cases, it would seem to follow that such a condition prior to action was excused in the present case and that the commencement of the action was sufficient notice because the law does not require something to be done for the mere form of it. If a notice were to be given, it was for the purpose of enabling the person to whom it was given to act. *Henderson Tire & Rubber Company v. P. K. Wilson & Son*, 235 NY 489, 139 NE 583.

The appellant had no information which he could have given the respondent by notice that would enable the latter to act. The shirt was destroyed (Tr. 45). It was a cash sale (Tr. 45). The exact date of purchase was unknown (Tr. 39). Appellant wasn't even certain of the price paid for the garment, or of the trade name (Tr. 40, 41, 46, 64). Appellant was not certain whether the shirt had two or three buttons down the front (Tr. 65). About all that the appellant could have told the seller was that he purchased a pink, cotton shirt, sometime in May, and that it had a polished finish. Naturally, the seller's most logical step would then be to determine if the garment or any part of it were still in existence so that it could be identified and tested. This inquiry would have received a negative reply and, considering the number of transactions the appellee undoubtedly made within this same period of time and within the same price range, identification would have been impossible.

For the foregoing reasons, appellant submits that the complaint was sufficient notwithstanding the failure to plead or prove any notice.

Point IV

The appellee waived any requirement of notice of breach of warranty that may be required under the Uniform Sales Act (ORS 75.490).

Fowler v. Crown-Zellerbach Corporation, CCA
Or 1947, 163 F2d 773;

Owen v. Schwartz, CA 1949, 177 F2d 641, 85 US
App DC 302;

Washington v. General Motors Acceptance Corporation, DC Fla 1956, 19 FRD 370;

Federal Rules of Civil Procedure, Rule 16;

Rules, United States District Court for District
of Oregon, Effective June 20, 1958.

ARGUMENT

The Rules of the United States District Court for the District of Oregon, effective June 30, 1958, with Revisions to July 31, 1958, provide in part:

"Rule 34

Pretrial Conferences

- (a) At least one pretrial conference, pursuant to Rule 16 Federal Rules of Civil Procedure, shall be held in every civil case unless the Court orders otherwise.
- (b) When the parties so agree, with the approval of the Court, the pretrial order may supercede the pleadings, and in that event the pleadings go out of the case. Otherwise, the pretrial order shall be supplemental to the pleadings."

Rule 16 of the Federal Rules of Civil Procedure contemplate that when the parties have limited their contentions and issues to be decided in a pretrial order and the same has been approved by the Court that they are confined to those issues during trial, unless modified to prevent manifest injustice. *Owen v. Schwartz*, CA 1949, 177 F2d 641, 85 US App DC 302; *Washington v. General Motors Acceptance Corporation*, DC Fla 1956, 19 FRD 370.

The pre-trial order which was approved by the Court and entered sets forth the issues to be determined at the trial (pp. 9, 10, Transcript of Record) as follows:

- “1. Did plaintiff purchase a shirt from the defendant?
2. If so, was the shirt which plaintiff purchased of highly flammable type and by reason thereof, not fit for use as wearing apparel?
3. Did the defendant breach its warranty of fitness for purpose?
4. Did plaintiff receive injuries as a direct and proximate result of defendant's breach of warranty?
5. If so, what is the amount of plaintiff's damages?”

It is clear that the parties intended to be limited to their contentions and the issues as set forth in the pre-trial order (Tr. 67, 68), and the appellee was, therefore, foreclosed from asserting as a ground for a directed verdict the failure of plaintiff to plead or prove notice. Nor can respondent assert it before this Court. *Fowler v. Crown-Zellerbach Corporation*, CCA Or 1947, 163 F2d 773.

CONCLUSION

It is submitted that the trial Court erred in finding that a jury question was not presented as to the fitness of the garment sold as demonstrated under Point I, and that it also erred in refusing the plaintiff a new trial as demonstrated under Points II, III and IV.

Respectfully submitted,

NICHOLAS GRANET

No. 16366

In the

United States Court of Appeals For the Ninth Circuit

JOHN L. OWEN, *Appellant*,

vs.

SEARS, ROEBUCK AND COMPANY,
a corporation, *Appellee*.

Appellee's Brief

Appeal from the United States District Court
for the District of Oregon

HONORABLE WILLIAM G. EAST, District Judge

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FILED

MAY 28 1959

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No. 16366

In the

**United States Court of Appeals
For the Ninth Circuit**

JOHN L. OWEN, *Appellant*,

vs.

SEARS, ROEBUCK AND COMPANY, a corporation, *Appellee*.

Appellee's Brief

Appeal from the United States District Court
for the District of Oregon

HONORABLE WILLIAM G. EAST, District Judge

JURISDICTION

This is an appeal by John L. Owen, plaintiff below, from a judgment entered by the United States District Court for the District of Oregon after a directed verdict in favor of Sears, Roebuck and Company, a corporation, defendant below, at the close of plaintiff's case in chief (Tr. of Record 15, 16). The action below was com-

menced by a complaint filed for breach of an implied warranty (Tr. of Record 3-5).

The plaintiff below was a citizen of the State of Oregon and the defendant below is a New York corporation (Tr. of Record 7). The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00 (Tr. of Record 7).

The United States District Court for the District of Oregon had jurisdiction of this cause by virtue of 28 U.S.C.A., Section 1332.

This court has jurisdiction by virtue of 28 U.S.C.A., Sections 1291 and 1294.

APPELLEE'S STATEMENT OF THE CASE

Appellee agrees with the factual portion of appellant's statement of the case, except insofar as the appellant infers that he had authorized his wife to purchase the allegedly defective shirt from the appellee. The appellant's wife was not authorized by the appellant to purchase the allegedly defective shirt from the appellee (Tr. 59, 73).

Further, the appellee would add that the record shows that appellant gave no notice to the appellee that the appellant intended to assert a claim for damages for breach of warranty until the complaint was filed.

STATEMENT OF POINTS

1. There was no substantial evidence presented in this case from which the jury could have found that the appellee sold a shirt which was not reasonably fit for the purpose intended.

2. There was no substantial evidence presented from which the jury could have found that the shirt in question was sold by the appellee to the appellant.

3. The requirement of reasonable notice of breach of warranty imposed by Oregon Revised Statutes Section 75.490 was not satisfied by the appellant.

4. The appellee did not waive the requirement of reasonable notice imposed by Oregon Revised Statutes Section 75.490.

ARGUMENT

POINT I

The trial court properly directed a verdict in favor of the appellee on the ground that there was no substantial evidence presented from which a jury could have found that appellee sold a shirt which was not reasonably fit for the purpose intended.

The doctrine of *res ipsa loquitur* does not apply to actions for breach of warranty.

The doctrine of *res ipsa loquitur* does not apply to actions for breach of warranty. In *Landers v. Safeway Stores, Inc.*, 172 Or. 116, 139 P.2d 788 (1943), plaintiff sued for a breach of warranty in connection with the sale by the defendant to the plaintiff of a bottle of White Magic bleaching solution. Plaintiff was allegedly injured by immersing his hands in the solution while cleaning an article of clothing. The court stated:

“* * * The complaint shows that the action in this case is based upon alleged breach of warranty and not upon negligence. Furthermore, the instrumentality which is claimed to have produced the injury was in the exclusive possession and control of plaintiff. The doctrine of *res ipsa loquitur* does not apply to such cases * * *” (citing authorities)

In *Oregon Auto-Dispatch v. Port. Cordage Co.*, 51 Or. 583, 94 Pac. 36, 95 Pac. 498 (1908), plaintiff alleged the purchase of a rope under a warranty that it was strong enough to lower a safe of a given weight from the third story of a given building. The rope allegedly broke and the safe dropped from the third story to the basement, resulting in damage to the safe. The court stated:

“* * * We do not understand that the maxim ‘*res ipsa loquitur*’ has any application to such case. That relates to cases involving negligence * * *”

It is clear from appellant's amended complaint (Tr. of Record 3-5) and from the *pretrial order* (Tr. of Record 7-11) that he brought his action on the theory of breach of warranty. It is further clear from the record that appellant had exclusive possession and control over the allegedly defective shirt from the time of its alleged purchase in May of 1955 until the date on which appellant sustained injuries as a result of appellee's alleged breach of warranty (Tr. 4-6, 44).

Under the Oregon cases cited and quoted above, it is obvious that the doctrine of *res ipsa loquitur* has no application to the case presently before the court and, therefore, it was incumbent upon the appellant to produce substantial evidence that the shirt purchased from the appellee was not reasonably fit for the purposes intended. *The appellant completely failed to sustain this burden of proof.*

The only evidence presented by the appellant was that the shirt purchased from the appellee burned when it was ignited by the appellant's own apparent carelessness in touching a cigarette or open flame to the shirt. No evidence was presented bearing on the construction of the shirt or the materials from which it was made. No evidence was presented as to the inflammable characteristics of similar shirts. The appellant apparently made no attempt to locate a similar shirt and have it

tested for inflammable characteristics. Furthermore, even though the appellant had the collar of the allegedly defective shirt (Tr. 10), he failed to save that remnant of said shirt and have it tested for inflammable characteristics.

Merely proving that one sustained injuries while using the allegedly defective article will not support a verdict of damages for such injury. *Landers v. Safeway Stores, Inc.* (supra).

In the *Landers* case, the court stated:

“* * * If * * * the court had instructed the jury that the mere fact alone that plaintiff's hands had been burned would not be sufficient evidence that the burn resulted from a breach of warranty, the instruction would have been free from error * * *”

Another case in point is *Simmons v. Rhodes and Jamieson, Ltd.*, 46 Cal.2d 190, 293 P.2d 26 (1956). Here plaintiff purchased some Read-Mix cement from defendant Rhodes and Jamieson, Ltd. After using the mixture for the purpose of laying a foundation for his home, plaintiff suffered severe burns. The court stated:

“Assuming that there was an implied warranty of fitness for the purpose of laying a basement floor including a secondary warranty that the cement was reasonably safe to handle, did the evidence disclose a breach of warranty?

"No.

* * * * *

"No evidence was introduced to show that this cement contained any unusual substance or differed from ordinary cement in any way."

It is evident from the *Simmons* case (supra) that the fact that the cement burned the plaintiff's hands was not sufficient evidence of any breach of warranty of that cement. The holding in the *Simmons* case, namely that merely proving that injury resulted from use of an allegedly defective article is not sufficient to establish a breach of warranty, is equally applicable to the case presently before the court.

It is a matter of common knowledge that clothes will burn and therefore it cannot possibly be said that appellee warranted that the shirt would not burn, if ignited. A seller does not warrant that goods can be used with absolute safety or that they are perfectly adapted to the intended use. This is evident from the court's statement in *Landers v. Safeway Stores, Inc.* (supra):

"* * * Such a warranty does not constitute an agreement that the goods can be used with absolute safety or are perfectly adapted to the intended use, but only that they shall be reasonably fit therefor * * * Nor can one recover for breach of implied warranty of fitness if he suffers harm by reason of the

improper use of the article warranted. See *Fredendall v. Abraham and Straus, Inc.*, 279 N.Y. 146, 18 N.E.2d 11."

Furthermore, clothing is purchased to wear and not to burn, and when it is carelessly ignited by a lighted cigarette or an open flame, as a matter of law, the article of clothing is not being used for the purpose intended.

Appellant relies strongly upon the case of *Deffebach v. Lansburgh*, 150 F.2d 591 (D.C. Cir. 1945). This case, however, is distinguished from the case presently before the court in that in addition to merely showing that the robe worn by the plaintiff caught fire, a textile expert, who had experimented with a sample of the same material from which the robe was made, testified that it had a very low resistance to flaming and that only a fraction of a second was required for ignition purposes. No such testimony appears in the case presently before the court.

Appellant also relies upon the case of *Frank R. Jellett, Inc. v. Braden*, 233 F.2d 671 (D.C. Cir. 1956). This case is also distinguishable. In speaking of the allegedly defective garment, the court stated:

"* * * The garment here in question was multi-colored, with an overlay of gold, probably a bronze metallic pigment. The pigment when heated could

have the effect of drying the fabric by dispersing heat and taking it up faster than the textile part of the material, thus achieving a more widespread dryness than otherwise might be found* * *”

In the *Jelleff* case there were also admissions of the experts as to the igniting and burning rate of cloth. In the case presently before the court, however, there was no such evidence as to the inflammability of the material from which the allegedly defective shirt was made.

In *Ringstad v. I. Magnin & Co.*, 39 Wash.2d 923, 239 P.2d 848 (1952), the only question on appeal was whether or not plaintiff's amended complaint stated a cause of action. The question of the sufficiency of the evidence presented by the plaintiff was not before the court.

Appellant also cites *Blessington v. McCrory Stores Corp.*, 305 N.Y. 140, 11 N.E.2d 421 (1953). In this case the only question before the New York Court of Appeals involved the applicable statute of limitations when an action is brought on a theory of breach of warranty.

Appellant also cites the case of *Lohse v. Coffey*, 32 A.2d 258 (D.C. Mun. Ct. App. 1943). This case is clearly distinguishable: *first*, on the ground that it involved an action for breach of warranty in the sale of food for

human consumption; *secondly*, in addition to merely proving that the food caused injury to the plaintiff, there was additional evidence that the food consumed by plaintiff was not fit for human consumption.

“* * * but did he prove the first element in the case—that the food was tainted? The fact that Monarch, who ate the same salads, also became ill, was evidence of such taint. His physician’s testimony that if the food was tainted it ‘was a competent producing cause’ of the trouble, and was also clearly acceptable proof. The two taken together supply a firm footing for the verdict * * *”

In *Barrett et ux v. S. S. Kresge Co.*, 31 Pa. D. & C. 379 (1938), cited by the appellant, the court held that there was sufficient *evidence of a deleterious substance* present in the dress to carry the case to the jury. In addition, however, to showing that the dress caused the injury to the plaintiff, there was expert testimony that the garment must have contained a poison to produce the injurious effect upon the plaintiff.

In view of the foregoing discussion, it is submitted that appellant failed to present any substantial evidence that the shirt in question was not reasonably fit for the purpose intended.

POINT II

The trial court could have properly directed a verdict in favor of the appellee on the ground that privity was lacking between the appellant and the appellee.

Appellant could not maintain an action against the appellee for breach of warranty unless there were privity of contract between them.

The general rule adhered to by the overwhelming majority of jurisdictions is that in order to recover in an action for breach of warranty there must be privity of contract between the warrantor and the person seeking recovery. 77 C.J.S. Sales, § 305 (b). It is clear from the record that the appellant did not purchase the allegedly defective shirt (Tr. 20, 23, 39) and consequently there was no privity between the appellee and the appellant. Furthermore, the appellant did not authorize his wife to purchase the allegedly defective shirt (Tr. 59, 73).

Even in family situations there must be privity of contract between the plaintiff and the defendant, if the plaintiff desires to recover on the theory of breach of warranty. In *Barni v. Kutner*, 45 Del. 550, 76 A.2d 801 (1950), the wife brought an action for damages received as a result of an automobile collision. The husband sought damages for loss of services and consortium of his wife, as well as medical expenses incurred for his

wife's injuries and damages to the car. The actions of the husband and wife were brought against the dealer of the automobile who sold said automobile to the husband. The alleged breach of warranty was that the brakes were defective. In holding that the wife could not recover against the dealer because she was not in privity with him, the court made the following statement:

“* * * The majority rule requires privity of contract to recover for breach of warranty. 46 Am. Jur. 487; *Chanin v. Chevrolet Motor Co.*, 7th Cir., 89 F.2d 889; *Pearl v. Wm. Filene's Sons Co.*, 317 Mass. 529, 58 N.E.2d 825. In my opinion, the majority view is more logical. A warranty is an integral part of a contract. It is primarily made for the benefit and protection of the promisee; its validity depends upon consideration. . . . Rights of third parties in cases like the present one arise entirely independently of the contract and may be enforced in an appropriate tort action; no powerful practical reason requires us to abandon or modify the basic principles of contract law in order to guarantee an adequate remedy * * *

In *Pearl v. William Filene's Sons Co.*, 317 Mass. 529, 58 N.E.2d 825 (1945), the wife purchased a wave set for herself and was injured in the application thereof. The husband brought an action for loss of consortium, and the court made the following statement:

“The plaintiff (husband) could not recover * * * for breach of warranty arising from the sale of the set to his wife. She and not he was the buyer. There

was no contractual relation between the defendant and him with respect to the sale of the set, and in this respect he stood as a stranger to the defendant * * *” (citing authorities)

In accord is *Great Atlantic & Pacific Tea Co. v. Walker*, 104 S.W.2d 627 (Tex. Civ. App. 1937), revs'd on oth. grds. 112 S.W.2d 170, wherein the court made the following pertinent observation:

“* * * Since a warranty is a part of a contract, only the parties to the contract, as a general rule, can assert rights which exist only by virtue thereof. We again quote from Corpus Juris: ‘Recovery on a warranty has been withheld from one whose connection with the goods is that of wife of the purchaser; and from a dependent child of the purchaser, even though the purchaser at the time of the sale expressly specified that the property was to be used for such child, * * *’”

In *Tally v. Beever & Hinds*, 33 Tex. Civ. App. 675, 78 S.W. 23 (1903), the defendants manufactured and sold to the plaintiff's father a gasoline pear burner. Plaintiff was injured by the top of a gas cylinder which blew off while plaintiff was filling the cylinder in accordance with the directions. The court held that only the father could recover on the theory of breach of warranty.

In *Duncan v. Juman*, 25 N.J. Super, 330, 96 A.2d 415 (1952), the parents of Joseph Duncan purchased

buns for family consumption at a neighborhood delicatessen. The son while eating a bun was injured on a wire lodged therein. A judgment in favor of the infant plaintiff was reversed because there was no evidence of negligence and because he could not recover on the theory of breach of warranty since he was not in privity with the defendant.

In *Hermanson v. Hermanson*, 19 Conn. Sup., 479, 117 A.2d 840 (1954), the father sought to recover for medical expenses incurred on behalf of his daughter, who was injured in an automobile accident. The action was brought against the dealer who sold the automobile to the wife. It was alleged that the injuries were sustained because the windshield lacked certain safety features warranted by the dealer. The court said:

“It is settled law that for breach of express warranty there can be no recovery except by the person with whom the seller made the contract of which the warranty is a part * * * Neither the minor plaintiff nor her father were parties to the mother’s contract of purchase of the car * * *”

In *Connor v. Great Atlantic & Pacific Tea Co.*, 25 F. Supp. 855 (W.D. Mo. 1939), the court held that an implied warranty of wholesomeness of food does not extend to the wife or other members of the family of the husband purchaser.

In *Welsh v. Ledyard*, 167 Ohio St. 57, 146 N.E.2d 299 (1957), the plaintiff's husband purchased an electric cooker from the defendant for use by the plaintiff. The cooker exploded and injured the plaintiff. Plaintiff brought an action on the theory of breach of warranty against the seller, but the court held that there was no such privity between the retailer and the plaintiff as would permit her to recover upon the theory of implied warranty.

In *Abraham v. M. S. Berkoff Co.*, 2 App. Div. 2d 686, 152 N.Y.S.2d 591 (1956), an action was brought by an infant for injuries sustained when a shower handle broke. The infant's father had purchased the shower handle from the defendant. The infant's action based on breach of warranty was dismissed, and the dismissal was affirmed by the appellate court.

The cases cited by the appellant on pages 11 and 12 of his brief to support the proposition that privity is not required in order for one to recover on the theory of breach of warranty are clearly distinguishable from the case presently before the court in that such cases involve *sales of food for human consumption*.

It is conceded that in a few cases involving sales of food for human consumption, the privity requirements have been abandoned or relaxed. This abandonment or relaxation of the privity requirement, however, has

only taken place where there have been sales of food for human consumption. Consequently, the cases cited by the appellant can have no application to the case presently before the court.

POINT III

The trial court could have properly directed a verdict in favor of the appellee on the ground that appellant gave no notice to the appellee that he intended to assert a claim for damages for breach of warranty as required by ORS 75.490.

A. The requirement of notice is applicable to the facts and circumstances of this case.

B. The appellant gave no notice that he intended to assert a claim for an alleged breach of warranty against the appellee.

Filing of the complaint is not a proper method by which notice may be given.

C. Assuming that commencement of an action is a proper method by which notice may be given, the commencement of the action in this case was not notice given within a reasonable time after the appellant knew or should have known of the breach.

D. Notice given by the appellant by his complaint was misleading and therefore insufficient.

E. Even assuming that the purpose of the notice requirement is merely to encourage the purchaser to inform the seller of facts which would enable the seller to act, appellant had much helpful information which he could have passed on to the appellee.

The true purpose, however, of the notice requirement is to inform the seller that the buyer intends to assert a claim for damages for breach of warranty against him.

A. Oregon has adopted the Uniform Sales Act in Oregon Revised Statutes, Chapter 75. ORS 75.490 provides:

“In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.” (Emphasis supplied)

In answer to appellant's contention that the notice requirement set forth in ORS 75.490 (*supra*) does not apply to the facts in the case presently before the court, it should be noted that ORS 75.490 and, in fact, the entire Uniform Sales Act, apply to the sale of all types of

goods. No exceptions are specified in any of the provisions of the Sales Act.

In *Ringstad v. I. Magnin & Co.*, 39 Wash.2d 923, 239 P.2d 848 (1952), a case strongly relied on by appellant, Mrs. Ringstad was injured when a summer cocktail robe purchased from defendant allegedly instantaneously burst into a sheet of flame when the robe came into casual contact with the burner of an electric stove while plaintiff's wife was preparing food in the kitchen. In referring to the notice requirement, the court made the following statement:

“* * * Neither the original nor the amended complaint stated a cause of action in negligence, and without an allegation of the notice required by Rem. Rev. Stat. § 5836-49, the original complaint stated no cause of action for breach of warranty * * *”

The Washington statute referred to in the above quotation is identical to O.R.S. 75.490 and certainly, if notice were required in the *Ringstad* case, the notice requirement would be equally applicable in the case presently before the court.

The notice requirement was specifically imposed in the following analogous cases:

Bruns v. Jordan Marsh Co., 305 Mass. 437, 26 N.E.2d 368 (1940). (Plaintiff was injured when she fell down-

stairs by reason of the heel becoming detached from the left shoe of a pair which she had purchased from defendant.)

Pearl v. William Filene's Sons Co., 317 Mass. 529, 58 N.E.2d 825 (1945). (Plaintiff husband sued for personal injuries sustained by his wife in using a permanent wave set sold by defendants to the wife.)

Smith v. Denholm & McKay Co., 288 Mass. 234, 192 N.E. 631 (1934). (Plaintiff was injured as a result of using a hair removing cream purchased at defendant's store.)

Murphy v. Gilchrist Co., 310 Mass. 635, 39 N.E.2d 427 (1942). (Pajamas purchased from defendant caused a rash on plaintiff's body.)

Harburger v. Stern Bros., 189 N.Y. Supp. 74 (Sup. Ct. 1921). (Plaintiff alleged that trousers purchased from defendant were full of holes shortly after they were purchased and that the cloth tore because of improper weaving.)

Silvera v. Broadway Dept. Store, Inc., 35 F. Supp. 625 (S.D. Cal. 1940). (Plaintiff sued for injuries allegedly resulting to plaintiff's forehead by reason of contact with a hatband purchased from defendant.)

Appellant cites *Kennedy v. F. W. Woolworth Co.*, 205 App. Div. 648, 200 N.Y. Supp. 121 (1923), in support of

his contention that the notice requirement is not applicable to the case presently before the court. The *Kennedy* case is clearly distinguishable since that case involved the *sale of food for human consumption* and in such cases a minority of courts have relaxed the notice requirement. Even in cases involving the sale of food, however, the great majority of courts still hold that the notice requirement of the Uniform Sales Act applies. The notice requirement was specifically imposed in the following cases involving the sale of food: *Schuler v. Union News Co.*, 295 Mass. 350, 4 N.E.2d 465 (1936); *Hazelton v. First National Stores, Inc.*, 88 N.H. 409, 190 Atl. 280 (1937); *Vogel v. Thrifty Drug Co.*, 43 Cal.2d 184, 272 P.2d 1 (1954); *Whitfield v. Jessup*, 31 Cal.2d 826, 193 P.2d 1 (1948); *Baum v. Murray*, 23 Wash.2d 890, 162 P.2d 801 (1945).

The cases cited by the appellant for the proposition that the notice requirement has no application to the facts of the case presently before the court have been *severely* criticized.

The court, in *Hazelton v. First National Stores, Inc.* (supra), in speaking of *Kennedy v. F. W. Woolworth Company* (supra), made the following observations:

“The plaintiff attempts to defend the action of the trial court upon the ground that the statute ‘was never intended to apply to the sale of goods for immediate human consumption,’ and in support of

this position relies upon the case of *Kennedy v. F. W. Woolworth Company*, 205 App. Div. 648, 200 N.Y.S. 121. The language of the New York court seems to sustain the plaintiff's position, but the decision was based upon the ground that the action was in substance one of tort in the nature of deceit rather than of contract. The interpretation which the court placed upon section 49 of the Sales Act was therefore unnecessary and appears to us to be inconsistent with the general plan of the statute and the purpose of the section in question.

“The English statute makes no special provision for warranty in sales of food. The American Sales Act follows it in this respect. * * * The matter has thus been stated by the New York Court of Appeals: ‘We have no doubt that section 96 (of the New York Personal Property Law [Consol. Laws. c. 41]; section 15 of the Sales Act) expressed as it is in general terms, applies to all sales including sales of food and that any rules hitherto applied inconsistent with this section are abolished.’” 1 Williston, *Sales* (2d Ed.) § 242a, citing *Rinaldi v. Mohican Company*, 225 N.Y. 70, 121 N.E. 471. Since the general provisions of the Sales Act in regard to warranties apply to sales of food and lie at the foundation of the plaintiff's case, it is difficult to understand upon what theory it can be held that the subsequent provisions of the act limiting the right of recovery for a breach of one of the warranties previously imposed are not applicable to cases arising out of sales of food.

* * * * *

“The purposes of the notice required by the Sales Act are, we think, similar to those enumerated above, and the requirement that prompt notice shall be given is equally imperative; ‘the statute makes it an absolute condition’ of liability for breach of warranty thereunder. 2 Williston, *Sales*, *supra*. No reason has been suggested, and none occurs to us, why

a seller of food for immediate human consumption needs protection from 'belated claims for damages' any less than a seller of food for less immediate use such as dried mushrooms, *Ferguson v. Netter* 204 N.Y. 505, 98 N.E. 16, or beans, *Niehoff-Schultze Grocer Co. v. Gross*, 205 App. Div. 67, 199 N.Y.S. 196, or than a seller of clothing, *Silverstein v. Blum*, 167 App. Div. 660, 153 N.Y.S. 34, or steel, *American Mfg. Co. v. U.S. Shipping Board Emergency Fleet Corporation (C.C.A.)* 7 F(2d) 565, or yarn, *Lincoln v. Croll*, 248 Mass. 232, 142 N.E. 820. We accordingly hold that the plaintiff's claim is subject to the requirements of section 49 of the Sales Act."

Both *Kennedy v. F. W. Woolworth Company* (supra) and *Silverstein v. R. H. Macy & Co.*, 266 App. Div. 5, 40 N.Y.S. 2d 916 (1943), are *severely* criticized in *Whitfield v. Jessup* (supra):

"It is argued, however, that the notice required does not apply to goods sold for immediate human consumption as distinguished from the sale of other chattels, and reliance is placed upon *Kennedy v. F. W. Woolworth Company*, 205 App. Div. 648, 200 N.Y.S. 121. (See, also, *Silverstein v. R. H. Macy & Co.*, 266 App. Div. 5, 40 N.Y.S.2d 916, refusing to apply it where the sale was of an article [gymnasium equipment] for immediate use.) The sales act on its face clearly applies to the sale of food or other articles for immediate human use or consumption. The reference throughout the statutory provisions on the law of sales is to the sale of 'goods'. In determining that there is an implied warranty that the food is fit for human consumption under the statutes dealing with the law of the sales of goods, it is accepted that the sale of food for immediate human consumption is a sale of goods under the statute. (citing authori-

ties). In *Kennedy v. F. W. Woolworth Company*, supra, the court reasoned, in face of the clear language of the statute requiring notice, that the reason for the requirement of notice is not relevant to such a case * * * There is no intimation in the statute that it is confined to cases where an inspection would show a defect of quality. It is clear that in cases where the article is sold for immediate human consumption the defect will eventually be discovered. Otherwise there would be no controversy over a breach of warranty. When the discovery should be made and what constitutes a reasonable time in cases of this class may well be somewhat different from cases where the article is not for immediate consumption, because of the opportunity for inspection, yet that does not mean the statute should have no application. Provision is made that the point from which the reasonable time runs is when the buyer knows or should have known of the breach. Thus the rule is not unduly hard upon him, and in cases where the defect is not readily discoverable, or an inspection is not feasible (such as in the case at bar where the food is for immediate consumption and the defect — the cause of undulant fever — is latent), we have factors bearing significantly upon when discovery of the breach should be made and what constitutes a reasonable time. The intimation in the *Kennedy* case, supra, is that the statute should not apply because the action sounds in tort. That may be true of all cases of warranty which pose the much debated question of whether an action on a warranty is in tort or contract. The fact remains that the statute deals with a warranty such as we have here whether an action thereon be said to sound in tort or contract.

“The courts in other jurisdictions have constantly refused to follow the *Kennedy* case and have held that the statute involved applies to warranties in the sale of goods for immediate consumption including food.” (Citing authorities)

Further criticism of *Kennedy v. F. W. Woolworth Co.* (supra) is found in *Schuler v. Union News Co.* (supra) and *Baum v. Murray* (supra).

At this juncture, it should be pointed out that appellant cites *Maxwell v. Southern Oregon Gas Corporation*, 158 Or. 168, 74 P.2d 594 (1938), as being in accord with *Kennedy v. F. W. Woolworth Co.* (supra) and *Silverstein v. R. H. Macy & Co.* (supra). The *Maxwell* case, however, merely holds that the requirement of notice, as set forth in the Uniform Sales Act, does not apply to a breach of warranty of title.

B. It is perfectly clear from the record that appellant gave no notice of the alleged breach of warranty to the appellee. The first notice which the appellee had of the alleged breach of warranty was the complaint filed by the appellant on May 22, 1957, approximately two years after the date on which the appellant became aware of the alleged breach.

Appellant cites the case of *Silverstein v. R. H. Macy & Co.* (supra) for the proposition that the commencement of the action itself affords sufficient notice of a breach of warranty under the Sales Act. *First*, it should be pointed out that the statement of the court in regard to the sufficiency of the notice was pure dictum in that the court held that the notice requirement was not necessary under the circumstances of the case; *secondly*, it

should be pointed out that the case relied on by the court in *Silverstein v. R. H. Macy & Co.* (supra), in making such statement, had nothing to do with notice of breach of warranty as required by the Sales Act. The case relied on by the New York court was *Henderson Tire & Rubber Co. v. P. K. Wilson & Son*, 235 N.Y. 489, 139 N.E. 583 (1923). In that case, defendants contracted to buy tires to be manufactured by the plaintiff. Defendants refused to accept the tires tendered by the plaintiff seller and notified the seller that they would not accept further delivery or give further specifications for manufacture. Plaintiff sued for breach of contract, and the court, in discussing whether plaintiff was required to give notice before commencing his action, made the following statement:

“There was no necessity for the plaintiff to give notice under section 146 of the Personal Property Law. But, if it be assumed that such notice were required, it gave all the notice that was necessary when it commenced this action within *a very short time* after the defendants had taken the position that they would not perform. The law does not require something to be done for the mere form of it, since it looks to substance. If a notice were to be given, it was for a purpose. No purpose could here have been served because defendants had announced they would give no further specifications and accept no further deliveries. Under such circumstances, what could possibly have been accomplished by giving a notice assuming that one were required? *Strasbourg v. Leerburger*, 233 N.Y. 55, 134 N.E. 834. When a no-

tice is required to be given, it is for the purpose of enabling the person to whom given to act. When the person has already taken a position which precludes action, a notice is never required * * *” (Emphasis supplied)

The *Henderson* case is clearly distinguishable from the case presently before the court in that the notice question was not discussed in relation to an action for breach of warranty and in that the action was started a very short time after the defendants had taken the position that they would not perform.

Furthermore, it should be pointed out that the court in *Silverstein v. R. H. Macy & Co.* (supra), in stating that commencement of the action itself affords sufficient notice of a breach of warranty, was apparently completely unaware of the purpose of the notice requirement. The true purpose of the notice requirement is to advise the seller that he must meet a claim for damages, and the law requires that the seller have early warning of this claim. Certainly, it cannot be said that the institution of an action two years after appellant became aware of the alleged breach of warranty was early warning of the appellant's claim. The purpose of the notice requirement is well stated by Judge Learned Hand in *American Mfg. Co. v. United States Shipping Board E. F. Corp.*, 7 F.2d 565 (2d Cir. 1925):

“The plaintiff replies that the buyer is not required to give notice of what the seller already knows, but this confuses two quite different things. The notice ‘of the breach’ required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of buyer’s claim that they constitute a breach. The purpose of the notice is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning.”

Judge Learned Hand’s language in *American Mfg. Co. v. United States Shipping Board E. F. Corp.* (supra) has been quoted and followed by an unbroken line of authorities ever since the decision in that case was rendered. See *Columbia Axle Co. v. American Automobile Ins. Co.*, 63 F.2d 206 (6th Cir. 1933); *Texas Motor Coaches, Inc. v. A. C. F. Motors Co.*, 154 F.2d 91 (3d Cir. 1946); *Whitfield v. Jessup* (supra); *United States v. Whittin Mach. Works*, 79 F. Supp. 351 (D. Mass. 1948); *Reininger et al v. Eldon Mfg. Co.*, 114 Cal. App.2d 240, 250 P.2d 4 (1952); *Ringstad v. I. Magnin & Co.*, (supra); *Howard-Cooper Corp. v. Umpqua Co.*, 148 Or. 582, 36 P.2d 590 (1934).

In *Howard-Cooper Corp. v. Umpqua Co.* (supra), the court stated:

“The purpose of the statutory provision requiring such notice is clearly to give the seller timely information that the buyer proposes to look to him for

damages for the breach; that the former may govern his conduct accordingly * * *” (Citing authorities)

Even the New York court in *Maggioros v. Edson Bros.*, 164 N.Y. Supp. 377 (Sup.Ct. 1917) stated:

“This provision is intended for the protection of the seller. The design of it is to give the seller an early notice of the alleged defects * * * The purpose of the statute was to give the seller notice, *before suit, and not by suit.*” (Emphasis supplied)

C. Even assuming that the commencement of the action is a proper method by which notice may be given, the commencement of the action in the case presently before the court occurred so long after the alleged breach of warranty became known to the appellant that such notice was insufficient as a matter of law.

It is apparent from the record that at any time after the appellant became aware of the alleged breach of warranty he could have easily notified the appellee that he intended to assert a claim for the alleged breach. It is evident from paragraphs I and II of appellant's amended complaint (Tr. of Record 3, 4) that the allegedly defective shirt was purchased at appellee's store in Portland, Oregon. At the time appellant was injured he was residing in Portland, Oregon, and at the time of trial

he was residing in Vancouver, Washington (Tr. 3), which adjoins the city of Portland. Appellant was employed in Vancouver, Washington, at the time he sustained his injuries and also after he recovered therefrom (Tr. 4, 20). Appellant was released from the hospital within three weeks after the date on which his injuries were sustained (Tr. 13) and had resumed gainful employment within eight weeks after such date (Tr. 24). It will also be noticed that after the date on which appellant sustained his injuries the appellant's wife was still working for the appellee at the store where the allegedly defective shirt was purchased (Tr. 38, 60-62), and that she worked in close proximity to the department in which the shirt was purchased (Tr. 40). Furthermore, after she left the appellee's employ, she was employed in a store in Vancouver, Washington (Tr. 42, 43). It should be added that there is no evidence that appellant was unable to give prompt notice, nor evidence from which it could be inferred that he was excused from giving such notice.

A case exactly in point is *Murphy v. Gilchrist Co.* (supra). Here plaintiff brought an action for breach of an implied warranty of fitness of two pairs of pajamas purchased by plaintiff from the defendant. The pajamas caused a rash on plaintiff's body. In holding that the notice given by plaintiff to defendant was not given with-

in a reasonable time, the court made the following observations:

“In our opinion this evidence would not warrant a finding that the plaintiff gave notice within a reasonable time after he knew or ought to have known of the breach. He waited forty days after the beginning of the rash, which even then he ‘associated’ with the pajamas, thirty-four days after he called a physician, and twenty-seven days after the physician expressed the opinion that the rash was a local condition and not a blood condition. It does not appear that the plaintiff acquired any additional knowledge after that. During nearly all of this time the plaintiff was working, and there is nothing to show that he was unable to give notice more promptly or that he had any excuse for not doing so. What is a reasonable time must be determined in view of the circumstances of each particular case and will vary widely in different types of cases. But in a case of this kind where the buyer has the necessary knowledge and shows no reason for delay the seller may be deprived of the protection which the statute was designed to afford him unless the notice is given more promptly than was done in this case.”

Another case directly in point is *Hazelton v. First National Stores, Inc.* (supra). Here an action for breach of implied warranty was brought for damages caused by eating trichinae infested pork sold by the defendant and a delay of six months in giving notice was considered unreasonable:

“At the time when the defendant’s motions for nonsuits were made, there was no evidence in the

case that any claim for breach of warranty had been presented to the defendant until the suits in question were instituted, more than a year after the plaintiffs were taken sick. At the hearing in this court, however, it was stated by the plaintiffs' counsel, and conceded by the defendant, that such a claim was presented by a letter addressed to the main office of the defendant corporation in Cambridge, Mass., by attorneys in Boston, upon October 17, 1933, which was approximately six months after the illness of the plaintiffs began.

* * * * *

"The statutory requirement of notice within a 'reasonable time' has been construed as a 'positive requirement of prompt notice.' 2 Williston, Sales, supra. 'Prompt notice' can mean nothing less than notice without unnecessary delay. A delay of six months in giving notice to the defendant of a claim for breach of warranty, therefore, required explanation as a part of the plaintiffs' case. No such explanation was given.

* * * * *

"* * * It is certain that no notice was given for six months and no 'business or legal excuse' for the delay is suggested. Under these circumstances it cannot be found that the statutory requirement of prompt notice was fulfilled, and it follows that the plaintiffs' action cannot be maintained * * *"

Another case squarely in point is *Silvera v. Broadway Dept. Store, Inc.* (supra). This was an action for injuries allegedly resulting to plaintiff's forehead by reason of contact with a hatband purchased from defendant. The court stated:

“* * * Seven and one-half months after the purchase and approximately seven months after the appearance of discoloration, is not timely notice * * *”

In *Davidson v. Herring-Hall-Marvin Safe Co.*, 131 Cal. App.2d 874, 280 P.2d 549 (1954), the buyer of a safe discovered that defective manufacture of the safe was responsible for moisture damage to a stamp collection stored therein, but did not notify the seller of the defect or of the damage to the stamps until more than fifteen months later. The court held that the delay in giving notice was unreasonable and that the buyer could not hold the seller liable for breach of warranty. After discussing *Whitfield v. Jessup* (supra), the court went on to say:

“The fair inference from this language is that in the case of sales of goods other than foodstuffs ‘containing latent defects,’ the court would regard a delay in giving notice of six months from the date plaintiff had knowledge of the breach as unreasonable as a matter of law. And such appears to be the fairly uniform holding of the courts which had occasion to consider the question under statutes identical with our own which is a counterpart of section 49 of the Uniform Sales Act * * *” (Citing authorities)

Even the New York cases require prompt notice of the alleged breach of warranty when plaintiff is suing

for a breach of warranty of clothing sold by defendant. A delay of twenty-three days in one case and fifty-six days in another in giving notice of defects in the quality of clothing were held to be unreasonable in *Silverstein v. Blum*, 167 App. Div. 660, 153 N.Y. Supp. 34 (1915), and *Matthes v. Benn*, 191 App. Div. 557, 181 N.Y. Supp. 670 (1920). A delay of twenty-three days in reporting defects in sandals was held to be unreasonable in *Kaufman v. Levy*, 102 Misc. 689, 169 N.Y. Supp. 454 (1918), and a delay of thirty-nine days was held to be unreasonable with reference to alleged defects in shoes in *Silberman v. Engel*, 125 Misc. 816, 211 N.Y. Supp. 584 (1924). In *Harburger v. Stern Bros.* (supra) the court held that a period of approximately seven months before notice was given to the alleged defect in trousers was unreasonable as a matter of law.

D. The notice required by the Uniform Sales Act should be clear and unambiguous. *Texas Motor Coaches, Inc. v. A.C.F. Motors Co.* (supra), *Wright v. General Carbonic Co.*, 271 Pa. 332, 114 Atl. 517 (1921). It has also been held that such notice must be unequivocal. *Murphy Laboratories, Inc. v. Emery Industries, Inc.*, 95 F. Supp. 561 (E.D. Pa. 1951). If it could be said, by any stretch of the imagination, that the notice afforded appellee by the appellant was timely, it certainly was not clear and unequivocal. In paragraph I of appellant's contentions

contained in the pretrial order (Tr. of Record 7), appellant asserts that he purchased a shirt bearing the name "Pilgrim" and paid appellee \$2.98 therefor. Similar contentions appear in paragraph II of appellant's amended complaint (Tr. of Record 3). At the time of trial, however, appellant and appellant's wife stated that the allegedly defective shirt was not a "Pilgrim" shirt and that the price paid therefor was not \$2.98 (Tr. 5, 40, 41, 46, 64-70). It is evident from the transcript that appellant has shown that the allegedly defective shirt was not a "Pilgrim" shirt for which appellant paid \$2.98 as alleged in his amended complaint and in the pretrial order. Consequently, the amended complaint could not possibly be construed as adequate notice since appellant completely misinformed appellee as to what allegedly defective article of merchandise was involved.

E. At page 17 of his brief, appellant contends that he had no information which he could have given to the appellee by notice that would have enabled the latter to act. Even assuming that the purpose of the notice requirement is merely to encourage the purchaser to inform the seller of facts which would enable the seller to act, appellant's contention is patently incorrect.

The information which the appellant could have given the appellee would certainly have assisted the appellee in identifying the lot from which the allegedly defec-

tive shirt had come. Appellant knew the color of the shirt (Tr. 4, 5); that the shirt had short sleeves with three buttons at the collar (Tr. 5); that the shirt was made from polished chambray cloth (Tr. 5, 6, 41); that the shirt had navy blue trimming and that it was a gaucho type shirt (Tr. 39); that the shirt was purchased in May (Tr. 39); that the purchase price of the shirt was less than \$2.98 (Tr. 41), but at least more than \$2.59 (Tr. 45, 46); that the shirt was purchased on a special sale (Tr. 41); that the shirt was made of light weight cotton cloth (Tr. 46).

If appellant had given appellee all the information specified above, certainly the appellee could have pinpointed the lot from which the allegedly defective shirt had come. Upon determining the lot, similar shirts could have been tested by the appellee for inflammable characteristics. Even assuming that it would have been difficult to determine from what lot the allegedly defective shirt had come, surely the appellee should have the opportunity to attempt to discover the type of shirt involved and to test it. Furthermore, any difficulty in tracing the shirt would only be increased by failure of the appellant to give prompt notice to the appellee. Timely notice of the alleged breach of warranty would also have given the appellee an opportunity to make demand upon the manufacturer of the shirt, to tender the defense of

this action to such manufacturer, and to enable the latter to prepare for trial.

Even assuming that the appellant had no information which could have been helpful to the appellee, it was still incumbent upon the appellant to inform the appellee that he intended to assert a claim against it. The appellant has misconstrued the purpose behind the notice requirement. The purpose of the notice requirement is to inform the seller that the buyer is claiming a breach of warranty. The statement by Judge Learned Hand in *American Mfg. Co. v. United States Shipping Board E. F. Corp.* (supra) makes this point with crystal clearness:

“The plaintiff replies that the buyer is not required to give notice of what the seller already knows, but this confuses two quite different things. *The notice ‘of the breach’ required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of buyer’s claim that they constitute a breach.* The purpose of the notice is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning.” (Emphasis supplied)

The fact that the allegedly defective shirt was not in existence is completely immaterial to the requirement of notice. This is evident from a statement of the court in *Whitfield v. Jessup* (supra):

“* * * ‘While it may be one purpose of the notice required by the statute to permit the seller to make inspection of the goods, whether in the hands of the vendee or not, it is certainly not its only purpose. “The purpose of the notice,” said Judge Learned Hand, “is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning.”’ * * *” (Emphasis supplied)

At page 17 of his brief, appellant states:

“If a notice were to be given, it was for the purpose of enabling the person to whom it was given to act.”

If it could possibly be said that appellant’s conception of the purpose of the notice requirement was correct, the case of *Henderson Tire & Rubber Co. v. P. K. Wilson & Son* (supra) relied on to support the statement from appellant’s brief quoted above is completely distinguishable. The discussion and quotation from that case (supra) clearly shows that the *Henderson* case did not involve a breach of warranty situation. It also will be noted in the quoted portion from that case that the court stated that no purpose could have been served by giving notice because the defendants had announced that they would give no further specifications and accept no further deliveries. In other words, the defendants informed

plaintiff in advance that they would not perform their part of the contract. In the case presently before the court, however, appellee gave the appellant no reason to believe that the appellee would not make an attempt to locate the lot from which the allegedly defective shirt had come, and thereafter make a test of identical shirts to determine the inflammability thereof. Certainly it was not the province of appellant to decide whether or not an identical shirt to the one allegedly defective could be found. The court in the *Henderson* case stated:

“* * * When the person has already taken a position which precludes action, a notice is never required
* * *”

It is perfectly obvious that the above statement from the *Henderson* case is not applicable to the appellee in the case presently before the court.

Based on the foregoing discussion the appellee submits that notice of the alleged breach of warranty was required under the facts of the case presently before the court and that no reasonable or sufficient notice was given.

POINT IV

A. Pleading and proving that reasonable notice was given in an action for breach of warranty is a condition precedent to recovery and is a burden resting on the ap-

pellant. It is not a matter of defense which must be raised by the appellee and therefore the appellee cannot be said to have waived the notice requirement by failing to raise the notice question in the pretrial order.

B. The Oregon statutory requirement of reasonable notice is a matter of substantive law which the federal court must apply in this case.

It is apparent from ORS 75.490 (*supra*) that the giving of reasonable notice is a condition precedent to recovery in an action for a breach of warranty. If notice of the breach is not given within a reasonable time after the buyer knows, or ought to know of the breach, "the seller shall not be liable therefor." (ORS 75.490)

The burden of pleading and proving that reasonable notice was given is placed upon the party claiming the breach of warranty. This is clearly evident from the language of the court in *Maxwell v. Southern Oregon Gas Corporation*, 158 Or. 168, 74 P.2d 594 (1938). In that case, the court stated:

"* * * The clear and practically unbroken current of authority establishes the doctrine that the requirement of notice, to be given by the vendee charging breach of warranty, is imposed as a condition precedent to the right to recover, and the giving of notice must be pleaded and proved by the party seeking to recover for such breach: * * *" (citing authorities)

* * * * *

“We, therefore, find it necessary to overrule the case of *Boone v. Lockhart*, supra, insofar as it holds that failure to give notice of breach of warranty under this statute is a matter of defense to be pleaded and proved by the vendor.”

In view of the *Maxwell* case (supra), it is clear that it was incumbent upon the appellant to contend and prove that sufficient and timely notice was given in the case presently before the court. The burden certainly was not upon the appellee to contend in the pretrial order that notice was not given. It is conceded that one of the purposes of pretrial procedure is to narrow the issues in each case, but it cannot be contended that pretrial procedure would relieve the appellant from contending and proving a prima facie case on which he is entitled to recover. Pretrial procedure does not shift such a burden from a plaintiff onto a defendant. Since there was no stipulation in the pretrial order that sufficient or timely notice had been given, it was necessary for the appellant to contend and to establish that the notice requirement had been satisfied.

B. It is apparent from the stipulation of facts in the pretrial order that the jurisdiction of the United States District Court for the District of Oregon was based on diversity of citizenship (Tr. of Record 7). Ever since the leading case of *Erie Railroad v. Tompkins*, 304 U.S. 64,

58 S.Ct. 817, 82 L.Ed. 1188 (1938), Federal District Courts, sitting in diversity cases, have been required to apply the substantive law of the states within which they sit. If it would significantly affect the result of a litigation for a federal court to disregard the law of a state that would be controlling in an action upon the same claim by the same parties in a state court, that state law would be considered a matter of substance which a federal court, sitting in a diversity case, would have to follow. The leading case of *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1944) clearly so holds:

“And so the question is not whether a statute of limitations is deemed a matter of ‘procedure’ in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?

* * * * *

“* * * *Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology * * * In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same,

so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.

* * * * *

“Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law.

* * * * *

“* * * Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be had in equity.”

In accord are *Angel v. Bullington*, 320 U. S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U. S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949); *Woods v. Interstate Realty Co.*, 337 U. S. 535, 69 S.Ct. 1235, 93 L.Ed. 1524 (1949).

It is clear that the requirement of pleading and proving that sufficient and timely notice was given to

the appellee is a matter of substantive law. It is obvious that it would significantly affect the result of this case if the Oregon statutory requirement of notice were not applied.

The Oregon court in *Tripp v. Renhard*, 184 Or. 622, 200 P.2d 644 (1948), in referring to § 71-149, O. C. L. A. (now ORS 75.490), made the following observations:

“It will be noticed that the provision exacts of a buyer, who is not favored by a stipulation to the contrary, a duty which he must perform if he wishes to hold the seller liable for a breach of warranty. The duty is the following: ‘give notice to the seller of the breach of any promise or warranty.’ The provision states clearly the time when the duty must be performed. The time schedule is: (1) ‘after acceptance,’ and (2) ‘within a reasonable time after the buyer knows, or ought to know, of such breach.’ By reverting again to the provision, it will be observed that its sweeping language is all inclusive. It is not applicable only in some forms of action, nor is it confined only to some defenses. In fact, it is not concerned with procedure. The object of its concern is something more fundamental than procedure. Procedure is subservient to or the handmaiden of rights. Section 49 is concerned with the recognition and extinction of rights. The provision recognizes no exceptions to the rights with which it deals and the duties which it exacts save only those wherein the parties by ‘express or implied agreement’ have provided for a different course. It states in simple language the result which the courts must recognize when the buyer fails to give the needed notice. The result, as stated, is: ‘the seller shall not be liable therefor.’ ”

In *Owen v. Schwartz*, 177 F.2d 641 (D.C. Cir. 1949), cited by appellant, plaintiff sought return of a \$5,000.00 forfeit money deposit which she had paid to defendant Schwartz, a real estate broker, in connection with an executory contract negotiated by Schwartz as agent for the owners of certain real property. The plaintiff alleged that she was induced to enter this contract by certain fraudulent representations made by defendant Schwartz. In her complaint, plaintiff alleged that defendant Schwartz represented that a \$30,000.00 loan *could be secured* on the property. In the pretrial order, however, the issue so formulated as to this loan commitment was that prior to plaintiff's entering the contract, *defendant Schwartz stated that he had a \$30,000.00 loan commitment on the property*. The evidence offered by plaintiff at trial was to the effect that defendant Schwartz had stated that he had a \$30,000.00 loan commitment on the property in question. Defendant claimed that this was a variance from the allegations of the complaint. The court held, however, that in view of the manner in which the loan commitment issue was formulated in the pretrial order, there was no variance.

Appellant also cites *Washington v. General Motors Acceptance Corp.*, 19 F.R.D. 370 (S.D. Fla. 1956). Here the purchaser of an automobile brought an action against the holder of a conditional sales contract for

wrongful conversion of such automobile. By pretrial order, one of the issues to be tried was whether or not the purchaser had given permission for repossession, and the action was tried on the issue of whether such permission had been given at the time the contract holder retook the automobile. The court held that the holder of the contract could not obtain a new trial on the ground that the purchaser had given such permission by the wording in the conditional sales contract.

In *Fowler v. Crown-Zellerbach Corp.*, 163 F.2d 773 (9th Cir. 1947), plaintiffs sought to recover damages on account of an alleged maintenance of a nuisance by the defendant. The pretrial order limited the issues for determination by the jury to the depreciation, if any, in the value of plaintiffs' property and to their loss, if any, of income therefrom as a result of the acts of the defendant. In view of the pretrial order, the court, on appeal, stated that plaintiffs were not entitled to damages for discomfort and annoyance or injury to health of themselves, as individuals, over and beyond any loss of income or depreciation in property value.

It will be noted that all of the cases cited by the appellant merely involved *attempts to alter factual issues clearly joined* in the pretrial order. These cases certainly do not hold that it is incumbent upon the *defendant* to assert the necessary facts constituting the

plaintiff's cause of action in the pretrial order, which, in effect, is the burden which the appellant is presently attempting to place upon the appellee in the case now before the court. As indicated above, the burden of pleading and proving timely and sufficient notice of the alleged breach of warranty is clearly placed upon the appellant. The appellee could not possibly be said to have waived the requirement of reasonable notice by failing to raise the notice question in the pretrial order, when the duty of raising such question squarely rests upon the appellant.

CONCLUSION

The trial court was correct in finding that there was no substantial evidence presented that the shirt sold by the appellee was not reasonably fit for the purpose intended. Furthermore, the trial court properly directed a verdict for the appellee because appellant failed to present any substantial evidence that there was privity between the appellee and the appellant; and because appellant failed to satisfy the statutory requirement of giving reasonable notice to the appellee of his intention to assert a claim for breach of warranty.

The giving of reasonable notice is a condition precedent to recovery. The *appellant* must plead and prove that reasonable notice was given, and the right to re-

ceive reasonable notice was not waived by appellee by failing to bring this requirement to appellant's attention in the pretrial order.

The judgment of the trial court must be affirmed.

Respectfully submitted,

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No. 16370 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PEDRO AMADO TORRES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 16370

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PEDRO AMADO TORRES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

A jury found the appellant not guilty on Count One and guilty on Count Two of a two-count Indictment on August 21, 1958 after a trial in the United States District Court for the Southern District of California [C. Tr. 13-4, 30].¹ Count One charged that on or about March 25, 1958 the appellant stole and unlawfully took and carried away a Bolex movie camera and two lenses which were a part of an interstate shipment of freight and that said goods had a value in excess of \$100 Count Two charged that on or about March 25, 1958 the appellant had the camera and lenses in his possession, knowing that they were stolen [C. Tr. 2-3]. The Court sentenced appellant to eighteen months on Count Two on September 5, 1958 [C. Tr. 15, 40]. The District Court had juris-

¹C. Tr. refers to the Clerk's Transcript; Tr. refers to the Reporter's Transcript.

diction under 18 U. S. C. §3231. Appellant filed notice of appeal within the time permitted by law [C. Tr. 54-55]. This Court has jurisdiction under 28 U. S. C. §1291.

Statement of the Case.

June 11, 1958. Indictment filed [C. Tr. 2-3].

June 30, 1958. Appellant arraigned and told that he was entitled to a trial by jury and to be represented by an attorney. Said appellant:

“I would like to have one [an attorney] before I plead and time in which to pay the bonding company. I would like to have [time] so I could hire an attorney.

The Court: I can put you over a week and give you a week. . . .

Appellant: Could I plead now and then hire an attorney?

The Court: Yes. . . .”

The appellant pleaded not guilty to both counts and the Court continued the case to July 7, 1958 for setting [Tr. 2a-4a].

July 7, 1958. Appellant appeared without an attorney. The Court continued the case to July 21, 1958 for setting and ordered appellant to be present with his attorney [C. Tr. 5].

July 21, 1958. Appellant appeared with Mr. Philip S. Schutz. The Court set the case for trial on August 12, 1958 [C. Tr. 6].

August 12, 1958. Appellant and Mr. Schutz appeared. Mr. Schutz made the following statement:

“Mr. Schutz: This defendant consulted my office some days before July 26th, and about the time when

he was last present before your Honor. At that time he desired my services, and talked with me exceedingly briefly concerning the merits of the matter, and was to appear in my office on Saturday, July 26th. He neither appeared, nor communicated with us, and at that time I wired him by day letter, requesting him to inform me regarding his intentions in this matter on the following Monday.

On July 30th, not having heard from the defendant in any way whatever, I wrote him a letter which, in substance, indicated that the United States Attorney's office called me and asked me if I would be ready for trial on August 12th, and further advising him he had not seen fit to retain me or appear or respond to my wire, and instructing him to either make arrangements to be fully represented by me by August 1st, or I would assume my services were not required, and he would retain other counsel. A copy was sent to the United States Attorney, attention of Mr. Robert D. Hornbaker, Assistant United States Attorney.

Thereafter, on August 7th I received from the United States Attorney's office the trial memorandum in this matter, and following a conversation with Mr. Hornbaker, I forwarded the memorandum to the defendant at his last known address by letter, making reference to my previous correspondence, and advising the United States Attorney's office that it appeared to me that I did not, in fact, represent the defendant in the matter.

* * * * *

Therefore, may it please the court, in response to a request from Mr. Hornbaker, I came in this morning, but I must represent to the court that I do not feel able to act in this man's behalf. I have had what I consider no cooperation whatsoever, and I therefore wish to be released."

The following colloquy then took place:

"The Court: Mr. Torres, you heard Mr. Schutz' statement. Is that true?

The Defendant: Yes."

The Court relieved Mr. Schutz after he stated that he would accept an appointment "with considerable feeling that I would not be entirely qualified to do as good a job as I might under other circumstances." Said he:

"... in view of the defendant's entire lack in contacting the office, forgetting the question of my representing him, I don't feel your Honor, in good conscience that I could—well, I don't feel well disposed toward the man. . . ." [Tr. 6a-9a].

So the Court appointed Mr. Daniel G. Marshal and continued the case again to August 14, 1958 [C. Tr. 8].

August 14, 1958. Mr. Marshal moved for a continuance, stating only that he had seen Torres "rather briefly" and "was not prepared to go forward with [the] case" [Tr. 3]. Mr. Marshal also objected to impanelling a jury although the Court clearly indicated that after the jury was selected the case would be continued until the following day. Said Mr. Marshal:

"I . . . object to the selection of the jury, because my selection of the jury, the questions I ask are always affected by the nature of the case I have to defend" [Tr. 4-5].

The Court ordered a jury selected and continued the case for five days to August 19, 1958 [Tr. 4-7].

August 19, 1958. Mr. Marshal made another motion for a continuance but gave no new reasons. The motion was overruled [Tr. 12-13]. The Government presented its case and rested [Tr. 14-100].

August 20, 1958. Mr. Marshal moved for a one day continuance to locate two alibi witnesses and “produce those witnesses if they have anything material to testify in this case.” The Court granted the motion and continued the case to August 21, 1958 [Tr. 106-108].

August 21, 1958. Defendant rested without calling a single witness and without moving for a further continuance [C. Tr. 13-14].

August 21, 1958. Jury returned verdict of not guilty on count one, guilty on count two [Tr. 166].

I.

Appellant Was Not Denied the Right to Have Assistance of Counsel Under the Sixth Amendment.

The granting of a continuance is a matter within the sound discretion of the trial court and will not be reviewed on appeal unless there is a clear abuse of discretion.

Williams v. United States, 203 F. 2d 85 (9th Cir., 1953);

Sherman v. United States, 241 F. 2d 329, 338 (9th Cir., 1957).

The refusal to grant a continuance, however, might be an abuse of discretion if it deprived a defendant of the effective assistance of counsel. Thus, in *Avery v. Alabama*, 308 U. S. 444 (1940), the Court said:

“Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel. In the course of trial, after due appointment of competent counsel, many procedural questions necessarily arise which must be decided by

the trial judge in the light of facts then presented and conditions then existing. Disposition of a request for continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed.

“But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution’s requirement that an accused be given the assistance of counsel. The Constitution’s guarantee of assistance of counsel cannot be satisfied by mere formal appointment.”

Whether a defendant has been denied the assistance of counsel depends upon all the facts and circumstances in the case, such as the nature of the charge, the issues presented, counsel’s familiarity with the applicable law, the pertinent facts and the availability of material witnesses.

C. J. S., §478;

Ray v. United States, 197 F. 2d 268, 271 (8th Cir., 1952).

Also, the defendant must make a showing of such facts and circumstances. In *Neufield v. United States*, 118 F. 2d 375 (D. C. Cir., 1941), the defendant was convicted with others of bank robbery. He had been represented by counsel from the time of his arraignment on September 21, 1939, to the date set for trial. On that date the defendant moved for a continuance to further prepare and to obtain witnesses. In sustaining a denial of the motion the Court said:

“The granting or refusal of a continuance is a matter of discretion of the judge to whom application

is made. *Avery v. Alabama*, 1940, 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377; *Isaacs v. United States*, 1895, 159 U. S. 487, 16 S. Ct. 51, 40 L. Ed. 229; *Tomlinson v. United States*, 1937, 68 App. D.C. 106, 93 F. 2d 652, 114 A. L. R. 1315, certiorari denied, 1938, 303 U. S. 646, 58 S. Ct. 645, 82 L. Ed. 1107. Therefore, under elementary principles of review, a trial court's ruling granting or refusing a continuance will not be reversed except for abuse of discretion. A party seeking a continuance must make a showing that the same is reasonably necessary for a just determination of the cause. If the continuance is sought for the purpose of securing the attendance of witnesses, it must be shown who they are, what their testimony will be, that it will be relevant under the issues in the case and competent, that the witnesses can probably be obtained if the continuance is granted, and that due diligence has been used to obtain their attendance for the trial as set. These propositions are so elementary as to require the citation of nothing but general authorities. See 12 *American Jurisprudence*, pages 448-471, inclusive, especially Sections 5, 9, 23, 24, 28; 16 *Corpus Juris*, pages 450-512, inclusive, especially Sections 829, 831, 846, 892, 921, 925; 22 *C. J. S. Criminal Law* pp. 737-837, inclusive, especially §§486, 488, 491, 502, 513.

In the instant case no showing was made that during the time between the arraignment on September 21, 1939, and the date of the trial, November 15, 1939, Neufield's counsel Solomon was excusably prevented from searching for witnesses or otherwise preparing the defense of the case. No showing was made as to the identity of the proposed witnesses or as to the nature, relevancy and competency of their testimony, or that they could be obtained if the con-

tinuance was granted. In these circumstances and in view of the further fact that the ten days' notice requested by Neufield's counsel of the date of trial was given, we cannot say that the trial judge must reasonably have concluded that the showing for a continuance was sufficient, and we cannot, therefore, say that he abused his discretion in refusing the continuance. Indeed, we think the showing for continuance was clearly insufficient. If, under the circumstances set out, a continuance must be granted, there will be no end to delays in criminal cases. Moreover, it was not made to appear in Neufield's motion for a new trial that any harm came to him through the refusal of the continuance. While the motion in general terms charged error in not granting the continuance, it made no particularization of any material witnesses or testimony that could have been produced had the continuance been granted. And it particularized no way in which Solomon could better have prepared the case if the continuance had been granted. In *Avery v. Alabama*, *supra*, the Supreme Court said: "That the examination and preparation of the case, in the time permitted by the trial judge, had been adequate for counsel to exhaust its every angle is illuminated by the absence of any indication, on the motion and hearing for new trial, that they could have done more had additional time been granted." And in the same case the Supreme Court recognized that "Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel."

In the instant case, appellant made no showing that Mr. Schutz was excusably prevented from searching for witnesses or otherwise preparing the defense. The record

shows that Mr. Schutz did nothing solely because he had had “no cooperation whatsoever” for over two weeks. Torres admitted this was true [Tr. 6a-7a].

Also, Mr. Marshal made no showing that he was excusably prevented from searching for witnesses. He failed to mention witnesses in his motions for continuances until after the Government had rested. He then moved for a continuance “so that we may be able to continue our investigation and produce . . . witnesses if they have anything material to testify to in this case” [Tr. 106]. The Government did not object and the Court granted the continuance. When the case resumed, the defense rested without calling a single witness and without making a further motion for a continuance. Presumably, the defendant found the unnamed witnesses and they did not have anything material to testify to. Otherwise, Mr. Marshal, who had already made three motions for a continuance, would have renewed the request. His failure to do so was a tacit admission that no further continuance was needed or necessary.

Mr. Marshal made no showing that he was otherwise prevented from preparing the case. In fact, the record shows a competent and well prepared defense. Mr. Marshal objected to the introduction of every Government exhibit [Tr. 20, 31, 38, 39, 43, 45, 51, 57, 62, 100]. He made some 50 other objections during the three-hour trial [Tr. 14, 24, 25, 26, 28, 29, 30, 32, 36, 37, 39, 40, 42, 43, 45, 48, 50, 56, 59, 60, 61, 68, 69, 70, 71, 96, 97, 98, 99]. His examination of Berny Silver, the principal government witness, was detailed and masterful [Tr. 73-95]. His objections to the giving and failure to give certain instructions have the mark of a master [Tr. 110-131].

Two cases are close on their facts to our situation. In *Couchis v. United States*, 142 F. 2d 1 (5th Cir., 1944), the defendant was found guilty on two counts of sedition. Like Torres, he had been given a reasonable time to get counsel and then showed up for trial without an attorney. The Court appointed counsel, denied a motion for a continuance and ordered the case to trial as scheduled. In affirming, the Court said:

“Under these circumstances, we do not think that it can be said that the refusal of the continuance was an abuse of discretion or that the defendant was otherwise denied a fair trial. If plaintiff had been represented by counsel of his own choosing, there would be no doubt about this, *Chastain v. United States*, 5 Cir., 138 F. 2d 413. Can it be that the fact alone that his counsel was court appointed instead of selected by the defendant has made an unfair trial of an otherwise fair one? We do not think so. It is true that the fact that defendant has no counsel and that the court appoints counsel for him on the day of, and refuses to delay, the trial is a fact to be considered in connection with the other facts in determining whether the trial has been fair, *Powell v. State of Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527. It is equally true, though, that this is only one of the many facts having bearing on the trial as a whole, and that the fact alone that counsel was appointed and a continuance was denied on the day of trial will not support a finding either of abuse of discretion in denying the continuance or of the denial of a fair trial, *Avery v. State of Alabama*, 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377; *Neufield v. United States*, 73 App. D. C. 174, 118 F. 2d 375. There was here no showing by defendant or his counsel that a particular witness, or witnesses, would, if present, testify to particular material facts. None

that if the trial was postponed or delayed, such witnesses or their testimony could be procured. There was merely a general request by counsel for a continuance so that he could more fully acquaint himself with the case and procure the necessary witnesses; a statement by the defendant that he was perhaps as ready as he ever would be; and an assurance by the court that counsel would be given all the time he needed to confer with his client and acquaint himself with his defenses. To hold that under these circumstances a denial of justice has occurred would be in effect to hold, that where a defendant appears without counsel and the court appoints counsel for him, all of the ordinary rules governing the orderly administration of the court are suspended; and that a defendant thus situated may freely chance a trial in the confidence that if he is acquitted, the verdict will stand, while if he is convicted, the verdict will be cause and only because he is represented by appointed counsel, be set aside. Universally protective as are the guarantees of due process, and compelling as are the considerations which make a vigilant concern for their affording of the essence of a fair trial, courts sit as well to convict the guilty as to acquit the innocent, and complaint alone, without a showing, that a fair trial has been denied, will not support a reversal. The record shows no reversible error."

In *United States v. Majeske*, No. 16,018, decided February 25, 1959, this Court passed on the same question. There, a Mr. Hanifin prepared the case but could not appear on the trial date. Instead, a Mr. Harry Alkow, who had represented the defendant at arraignment on December 9, 1957, appeared and moved for a continuance. The Court directed Mr. Alkow to select a jury and postponed the trial until the next day. Mr. Hanifin could not appear

again and the case was ordered to trial with Mr. Alkow acting for the defendant. In affirming, this Court said:

“So far as Majeske was concerned, no prejudice has been shown. So far as the record before us shows, Alkow properly represented him. No error has been pointed out. Therefore, irrespective of the fact that he was not represented by the counsel whom he originally employed, the conviction must be affirmed. He did not object to the representation by Alkow when the plea was entered. Neither Hanifin nor Alkow nor defendant had advised the court before the date set for trial that Hanifin could not be present. The courts could not be successfully administered if such an excuse were held good ground for postponing a trial for several days to suit the convenience of the attorney. If it were valid in one case, the court might have the same type of excuse in every case called. Here the court did grant one day extension, during which time arrangements for defense could have been made.”

So it would seem that where an attorney, as here, had from August 12th until August 21st to prepare his case there can be no error. This is especially true in a “fact” case where the defendant got all the time he asked for to find witnesses and where counsel ably and competently represented him.

Cf., Baker v. United States, 255 F. 2d 619, 621 (9th Cir., 1958).

Instead of being deprived of the right to counsel, this defendant got the assistance of—not one—but two counsels.

II.

Acquittal on the Theft Count Did Not Amount to an Acquittal on the Possession Count.

Appellant relies on the language of Chief Judge Yankwich that “the ‘possession’ part of this law ‘could not mean that the man who steals (the property) can be charged with possession after he has been acquitted of stealing’ [R. 239/17-19] and that the only possession proved here is not the possession contemplated by this statute [R. 241/3-5].” Appellant continues: “In granting these motions [for leave to appeal *in forma pauperis* and to fix bail pending appeal] [R. 242/12, 24] the Chief Judge prefaced his ruling by saying that here ‘theft implies possession, and unless you have evidence that the possession was that of property which someone else stole, the second offense is not committed, because the possession implied in larceny is not enough to convict under the second paragraph, and this second paragraph is a distinct offense, as the statute indicates.’ [R. 242/6-11.]” (App. Br. p. 13.)

The above statements should be compared with the facts: Mr. Roberts, a dock man for Interstate Express Inc., received the Bolex camera and lenses at the Interstate platform, 320 South Hewitt Street, Los Angeles, on March 25, 1958 [Tr. 63-66, 88]. Mr. Paul Williams, a freight forwarder operating under the name of Interstate Express, said that they turned up missing the following day and that they could not be found after a search by three men [Tr. 46-48]. The Government Attorney told the jury in his Opening Statement that he was not going “to call any witness who actually saw the defendant steal the camera from the loading platform” [Tr. 11]. Mr. Marshal made this statement one of the cornerstones of his defense. Said he, in moving for a judgment of acquittal early in the

case: "According to the Government's opening statement, it admits there will be no eyewitness to actually testify" [Tr. 12]. And in his closing argument, he said: "But stop and think—is there one word of evidence that the defendant was even in this room when the property was stolen" [Tr. 142]. Again, in moving for a judgment of acquittal at the close of the Government's case, he said: ". . . is there any evidence here that the camera was stolen? There is evidence here that the camera was missing from the freight platform after it was checked in there by the consignor. But so far as the theft is concerned, there isn't even any evidence of theft" [Tr. 177-178]. Berny Silver said that he bought the camera and lenses from Torres "in the latter part of March or first part of April" [1958] at 507 North St. Louis Street, Los Angeles [Tr. 67-68], and the jury was instructed that "possession of stolen property shortly after the theft is a circumstance tending to show theft unless the possession is satisfactorily explained" [Tr. 155]. Still, the jury was apparently persuaded by Mr. Marshal's vigorous argument that the appellant should not be found guilty of theft unless someone saw him take the property. Nevertheless, the Government argues that the fact that the camera and lenses were delivered to an Interstate platform for shipment on March 25th, that they turned up missing the next day, that they could not be found after a diligent search and that they were found shortly thereafter in the unexplained possession of the defendant in an obscure coffee shop was sufficient evidence for the jury to find that they had been stolen *by someone*.

Cf. United States v. Gollin, 166 F. 2d 123 (3rd Cir., 1947).

In this connection, the Court should view the evidence most favorably to the Government.

United States v. Glasser, 315 U. S. 60, 80 (1942);

Dean v. United States, 246 F. 2d 335, 336-377 (8th Cir., 1957);

United States v. Brown, 236 F. 2d 403, 405 (2d Cir., 1956);

Arena v. United States, 226 F. 2d 227, 229 (9th Cir., 1955);

Schino v. United States, 209 F. 2d 67, 72 (9th Cir., 1953), cert. den. 347 U. S. 937 (1954);

Woodward Laboratories v. United States, 198 F. 2d 995, 998 (9th Cir., 1952);

O'Leary v. United States, 160 F. 2d 333 (9th Cir., 1947).

Defendant says *Prince v. United States*, 352 U. S. 322 (1957), "teaches that if defendant stole the property himself there could be only one offense because theft could not be proved except by also proving possession it follows that his acquittal of the theft (the Government having failed to prove another was the thief), operated as an acquittal of possession since the innocent verdict included a finding he did not possess the stolen property he was acquitted of stealing." (App. Br. p. 13.)

Prince v. United States, *supra*, teaches nothing of the kind.

In the *Prince* case the defendant was convicted under 18 U. S. C. §2113 of entering a national bank with intent to commit a felony and robbing the bank. The defendant got consecutive sentences and the only question was whether the entering count merged into the robbery. In

holding that it did, the Court carefully examined the legislative history of 18 U. S. C. §2113, saying:

“In addition to the Court of Appeals cases on the precise question, both petitioner and the Government cite as analogous other cases that involved fragmentation of crimes for purpose of punishment. None of these is particularly helpful to us because *we are dealing with a unique statute of limited purpose and an inconclusive legislative history. It can and should be differentiated from similar and other problems in this general field raised under other statutes. The question of interpretation is a narrow one, and our decision should be correspondingly narrow.*” (Italics added.)

How could the Court have stated any more clearly that they did not intend their decision to have any effect on problems raised under other statutes?

Contrary to appellant's interpretation of the *Prince* case, there are many Circuit Court cases under 18 U. S. C. §659 holding that theft and possession by the thief are separate offenses. The question first arose in *Carpenter v. Hudspeth*, 112 F. 2d 126 (10th Cir., 1940), cert. den. 311 U. S. 682 (1940). There, the defendant Carpenter was charged under 43 Stat. 793 (1925), 18 U. S. C. §409 (1940), which provided in pertinent part:

“That whoever shall unlawfully break the seal of any railroad car containing interstate or foreign shipments of freight or express, or shall enter any such car with intent in either case to commit larceny therein; or *whoever shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house platform, depot, wagon, automobile, truck, or other vehicle, or from any steamboat, vessel, or wharf, with intent to*

convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express, or shall buy or receive or have in his possession any such goods or chattels, knowing the same to have been stolen; or whoever shall steal or shall unlawfully take, carry away, or by fraud or deception obtain with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation from one State or Territory or the District of Columbia to another State or Territory or the District of Columbia or to a foreign country, or from a foreign country to any State or Territory or the District of Columbia, or shall break into, steal, take, carry away, or conceal any of the contents of such baggage, or shall buy, receive, or have in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been stolen, shall in each case be fined not more than \$5,000 or imprisoned not more than ten years, or both, . . .”*

*63 Stat. 91 (1949), 18 U. S. C. §659 (1950), which consolidated part of 18 U. S. C. §409 (1940) with other sections, now provides:

“Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motor truck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattel moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

“Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to been embezzled or stolen; . . .

“Shall in each case be fined not more than \$5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.”

The defendant was found guilty with others on four counts of a first indictment charging (1) breaking the seal on a railroad car with intent to commit larceny therein, (2) stealing footwear from the car, (3) receiving and possessing the footwear, knowing they had been stolen, and (4) conspiracy to break the seal, steal, receive and possess the footwear. He was also found guilty on four counts of a second indictment charging (1) entering the car with intent to commit larceny, (2) theft of tables from the car, (3) purchase, receipt and concealment of the tables, and (4) conspiracy to receive and conceal the tables. The defendant was sentenced to five years on the first, second and third counts of the first indictment and to two years on the fourth count, to be served consecutively. He received similar sentences on the four counts of the second indictment, to be served concurrently with those of the first. Defendant claimed, in a petition for a writ of habeas corpus, that the first, second and third counts of each indictment were based on one continuous transaction and constituted a single offense. The Court, considering only the first indictment, denied the writ, saying:

“The statute clearly embraces several separate and distinct offenses. Breaking the seal of a railroad car containing an interstate shipment of freight is one; entering the car with intent to commit larceny therein is another; stealing merchandise from the car is a third; and concealing property with knowledge that it had been stolen from such a car is a fourth. *Morris v. United States*, 8 Cir., 229 F. 516; *Greenburg v. United States*, 7 Cir., 253 F. 728; *Caudle v. United States*, 8 Cir., 278 F. 710. And the power of Congress thus to provide that separate acts, though parts of a continuous transaction, shall constitute separate

crimes cannot be doubted. *Burton v. United States*, 202 U. S. 344, 26 S. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; *Morgan v. Devine*, 237 U. S. 632, 35 S. Ct. 712, 59 L. Ed. 1153; *Reger v. Hudspeth*, 10 Cir., 103 F. 2d 825, certiorari denied, 308 U. S. 549, 60 S. Ct. 79, 84 L. Ed.

“In a case of this kind where a single continuous transaction may constitute a violation of distinct provisions in a statute, the test in determining whether separate offenses are charged in different counts of the indictment is whether each count requires proof of a fact which is not required of the others. *Chrysler v. Zerbst*, 10 Cir., 81 F. 2d 975; *Norton v. Zerbst*, 10 Cir., 83 F. 2d 677, certiorari denied, 299 U. S. 641, 57 S. Ct. 24, 81 L. Ed. 398; *Reger v. Hudspeth*, *supra*. Here proof of breaking the seal with intent to commit larceny in the car was sufficient to warrant a conviction upon the first count. No proof of entering the car, committing larceny from it, or receiving or concealing the stolen property was required. Again, proof of larceny of merchandise from the car was enough to justify conviction upon the second count. No proof of breaking the seal, or of concealing the stolen chattels was necessary. *And proof of having possession of the stolen merchandise at a subsequent time and different place from its theft, with knowledge that it had been stolen, was sufficient to support conviction upon the third count.* One defendant receiving it from another could have been convicted on such proof even though he did not take part in breaking the seal, entering the car, or committing the larceny. It is manifest that the several counts each charged a separate and distinct crime, entirely apart from the others.” (Italics added.)

On appeal, in *United States v. Carpenter*, 143 F. 2d 47 (7th Cir., 1944), Judge Evans said:

“Appellant argues that a proper interpretation of the grammatical and structural composition of the statute (18 U. S. C. A. §409) necessitates the conclusion that Congress meant to impose penalties for any of three separate *classes* or *categories* of crimes. It did not, however, mean to make a separate crime of every *act* described in each of the several classes or categories. In support of such theory, counsel points out that each category begins with the identical word ‘whoever’ and is set off by semi-colons, whereas the several condemned acts within the respective categories are not so stated, merely being joined with the disjunctive ‘or’ and separated by commas.

“The statute reads (we add the numerals which appellant uses to designate his categories):

“‘(1) Whoever shall unlawfully break the seal of any railroad car . . . or shall enter any such car with intent in either case to commit larceny therein; (2) or whoever shall *steal* or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car . . . with intent to convert to his own use any goods or chattels . . ., or shall buy or *receive* or have in his possession any such goods or chattels, knowing the same to have been stolen; (3) or whoever shall steal or shall unlawfully take, carry away, or by fraud or deception obtain with intent to convert . . . any baggage, . . . or shall break into, steal, take, carry away, or conceal any of the contents of such baggage, or shall buy, receive, or have in his possession any such baggage . . . shall *in each case* be fined not more than \$5,000 or imprisoned not more than ten years, or both . . .’

“It is counsel’s urge that the second and third counts, namely, for stealing and for receiving, are for but a single crime in that they are both covered by the one category, *i.e.*, class (2), and therefore appellant has suffered two five year sentences but one crime.

“Appellant also stresses the phrase ‘*in each case*’ as being indicative of Congressional intent to impose a sentence only upon each of the *classes of acts* outlined.

“A second contention, which was the one involved in the habeas corpus proceedings, is that the charge of stealing and possessing does not define two crimes because only one criminal intent was involved. In other words, in all cases where there is a stealing, there is, *per se*, a possessing.

“Counsel stresses the fact that the bill of exceptions, which was not consulted on the prior appeal because not duly filed, disclosed that appellant was not even at the site of the crime, but a block distant, and only by virtue of a conspiracy or by proxy could he be deemed to have participated in the stealing.

“Appellant also contends that there is duplication of punishment in the imposition of a sentence on the conspiracy count, for the same evidence was used to gain a conviction on this count as was used to establish guilt under the first three counts.

“The earnestness of counsel, the severity of the sentence, and the parolement of appellant to service in the army, have all impelled us to re-examine this statute and the decisions.

“We repeat the statute, but in skeleton form. It would seem that crimes were described therein as follows:

“(1) break the seal
enter

- (2) (as to goods or chattels in interstate commerce)
steal
unlawfully take
carry away
conceal
obtain by fraud or deception
buy
possess
- (3) (as to any baggage)
steal
unlawfully take
carry away
obtain by fraud or deception.

“Congress defined and penalized every conceivable form of act, every gradation of the process of burglarizing interstate commerce, when it enumerated these many acts. It intended to make criminal *any* act therein recited. If two of the acts in any category were disclosed, two crimes were committed. It would be different if the terms were synonymous of the acts, one within the scope, or partial scope of the other, but each defines an act of a different nature. It is true that one who steals generally possesses, but the contrary is not inherently true.

“Another possible explanation for the categorical structure of the section might be that one category relates to the stealing of interstate freight, a second to stealing of baggage, and the third, the initial steps of such larceny, *i.e.*, entering a freight car.

“We are unable to read the statute other than that Congress intended to make each and every separate act named, a separate crime. See *Blockburger v. United States*, 7 Cir., 50 F. 2d 795; *Id.*, 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306; *Carpenter v. Huds-*

peth, 10 Cir., 112 F. 2d 126. If the construction seems harsh, it must also be appreciated that there is a vast difference between the maximum and the minimum sentence provision as there is a vast difference between the action and motives of different offenders. In the trial judge, there is lodged wide discretion, and if misjudgment results in too severe judgments, the accused may secure relief through executive clemency, as well as by parole.

“Our problem is to construe the statute. In so doing, we cannot rewrite it, nor ignore the language which is clear. . . .”

United States v. Carpenter, *supra*, was followed in *United States v. Dunbar*, 149 F. 2d 151 (7th Cir., 1945), *cert. den.* 325 U. S. 889 (1945).

Three other circuits have followed the above decisions. In *Carroll v. Sanford*, 167 F. 2d 878 (5th Cir., 1948), the Court said:

“Section 409 of Title 18 U. S. C. A., punishes not only those who steal interstate freight but also whoever ‘shall buy or receive or have in his possession any such goods or chattels knowing the same to have been stolen.’ *The thief can, after stealing, have in his possession the stolen property knowing the same to have been stolen, and thus commit a further and different offense, and be punished for both.* *United States v. Dunbar*, 7 Cir., 149 F. 2d 151; *Carpenter v. Hudspeth*, 10 Cir., 112 F. 2d 126. *We do not say that the possession involved in the act of stealing would suffice, because the goods must have been fully stolen before there could be knowledge that they were stolen goods.* In the present habeas corpus hearing it appeared from the record of conviction in 1944, and from the evidence, that a case of cigarettes was stolen

by appellant and on the same date the same case of cigarettes was in his possession, and that he was given separate consecutive sentences as for the two crimes under discussion, the first sentence having now been served. This is not enough to show that he is suffering double punishment for the same offense contrary to the Constitution.” (Italics added.)

In *Carroll v. United States*, 174 F. 2d 412 (6th Cir., 1949), the Court said:

“The majority of the court is of opinion that stealing goods from an interstate shipment of freight and the possession of the same goods with knowledge that the same have been stolen constitute separate and distinct offenses under Section 409 of the Criminal Code; and that it is, therefore, lawful to impose separate punishment for stealing and for felonious possession of the stolen goods. This has been the long accepted and applied interpretation of the statute by the United States District Courts, and has been upheld directly by three United States Courts of Appeals, namely, those for the Seventh Circuit, the Tenth Circuit, and the Fifth Circuit. *United States v. Carpenter*, 7 Cir., 1944, 143 F. 2d 47. *United States v. Dunbar*, 7 Cir., 1945, 149 F. 2d S. Ct. 1577, 89 L. Ed. 2002; *Carpenter v. Hudspeth*, 10 Cir., 1940, 112 F. 2d 126; *Carroll v. Sanford*, 5 Cir., 1948, 167 F. 2d 878.

“Judge Bratton pointed out in *Carpenter v. Hudspeth*, *supra*, that the statute clearly embraces several separate and distinct offenses: (1) breaking the seal of a railroad car containing an interstate shipment of freight; (2) entering the car with intent to commit larceny therein; (3) stealing merchandise from the car; and (4) concealing property with knowledge that it had been stolen from such a car; and that the

power of Congress thus to provide that separate acts, though parts of a continuous transaction, shall constitute separate crimes cannot be doubted.

“Judge Evan Evans, in *United States v. Carpenter*, *supra*, made a careful and logical analysis of the statute, even to the point of considering and weighing the argument of appellant in that case based upon the grammatical and structural composition of the statute and the placement of semi-colons and commas. He skeletonized the statute into the separate crimes described therein, and stated that Congress had defined and penalized every conceivable form of act, every gradation of the process of burglarizing interstate commerce, when it enumerated the many acts intended to be made criminal. He said: ‘If two of the acts in any category were disclosed, two crimes were committed. It would be different if the terms were synonymous or the acts, one within the scope, or partial scope of the other, but each defines an act of a different nature. It is true that one who steals generally possesses, but the contrary is not inherently true. . . . We are unable to read the statute other than that Congress intended to make each and every separate act named, a separate crime. See *Blockburger v. United States*, 7 Cir., 50 F. 2d 795; *Id.*, 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306; *Carpenter v. Hudspeth*, 10 Cir., 112 F. 2d 126. If the construction seems harsh, it must also be appreciated that there is a vast difference between the maximum and the minimum sentence provision as there is a vast difference between the action and motives of different offenders. In the trial judge, there is lodged wide discretion, and if misjudgment results in too severe judgments, the accused may secure relief through executive clemency, as well as by parole. Our problem is to construe the statute. In so doing, we can-

not rewrite it, nor ignore the language which is clear.' 143 F. 2d 48.

"It should be observed that, in the instant case, the district judge would have been empowered within the limit of the statute to impose a sentence of ten years' imprisonment on the first count of the indictment; but he chose to impose five-year consecutive sentences on the two counts. It is obvious from his order, quoted above, that he considered that an aggregate ten-year sentence was required to make the punishment fit the crime. It is thus apparent that appellant has not been prejudicially affected by the judge's chosen course even were he right in his contention, which the majority of the court thinks he is not.

"In *United States v. Dunbar, supra*, in which certiorari was denied by the Supreme Court, the Court of Appeals for the Seventh Circuit held again, in affirming an order of the district court denying the motion of the convicted defendant to modify sentence and correct judgment, that the district court had power to impose sentences, for theft of merchandise from a railroad car and for possession of the same merchandise, to be served consecutively even though the separate offenses constituted parts of a single continuous transaction.

"While the Supreme Court has made it clear that the denial of a writ of certiorari imports no expression of opinion upon the merits of a case, we are constrained to think that denial of certiorari in *United States v. Dunbar, supra*, should not be treated as meaningless. The precise issue here was there presented and involved the continuance, if erroneous, of long established practice in the district courts to treat theft from interstate commerce shipment and possession of the goods so stolen as separate and distinct offenses. In view of the importance of the

question in the administration of criminal justice in the United States Courts, it would seem that had the Supreme Court considered the practice wrong and that double punishment was unlawfully being meted out the decision of the Court of Appeals in the Dunbar case, which followed the earlier decisions, would have been reversed. This is a reasonable inference from the fact that the Supreme Court did correct the error of the inferior federal courts when it held that the offense of bank robbery by the use of deadly weapons, as defined in section 588b(b), Title 12 U. S. C. A. [now 18 U. S. C. A. §2113], is the same offense described in section 588b(a), aggravated by the use of a deadly weapon; and that Congress did not intend to define two separate offenses, but only one. See *Lockhart v. United States*, 6 Cir., 136 F. 2d 122, 124, and cases cited.

“The Court of Appeals for the Fifth Circuit has declared itself in accord with the opinions of the Seventh and Tenth Circuits upon the subject matter. In *Carroll v. Sanford*, 5 Cir., 167 F. 2d 878, it was held that a thief can, after stealing goods from an interstate shipment, have in his possession the stolen property knowing it to have been stolen and thus commit a further and different offense under section 409 of the statute and be punished for both.”

In *United States v. Dolasco*, 184 F. 2d 746 (3rd Cir., 1950), the Third Circuit followed the rule. There the defendant was indicted in two separate counts under 18 U. S. C. §659 for stealing goods in interstate commerce and for “receiving or possessing” such goods knowing them to have been stolen. The jury found defendant guilty of stealing and not guilty of receiving and possessing. Defendant argued that the verdict of guilty on the stealing count could not stand because it was inconsistent

with a verdict of not guilty on the possession count. The Court said:

“There are two answers to the defendant’s second ground for reversal, the alleged inconsistency of the verdicts. A short one is that consistency in the verdicts is not necessary, even though the same evidence is offered in support of each. *Dunn v. United States*, 1932, 284 U. S. 390, 52 S. Ct. 189, 76 L. Ed. 356. Each count in the present indictment charges a separate crime and it is enough if there is sufficient evidence to support the jury’s verdict of guilty on any one.

“Second, the two verdicts are not necessarily inconsistent. The jury may well have believed that defendant participated in the stealing of the goods but that he never had possession or received them in the sense in which those terms are understood by laymen. Defendant was never seen to handle the goods, and it may well be too much for a group of non-lawyers to see how a man has received something he has not touched. That this was in the minds of the jurors is evidenced by the fact that when the jury was summoned for further instructions, and upon being told that ‘a person may be guilty of stealing merchandise whether he does it himself or through people working under his direction,’ the jury reached a verdict quickly. The defendant cannot complain that the judge did not add that he may also be guilty of possessing stolen goods if they are possessed by persons acting under his direction and control. If such an omission was error, it was in the defendant’s favor.”

In our case, the jury did the opposite; they found appellant guilty of possessing, but not guilty of stealing. Since they were separate offenses, there was no inconsistency.

The jury simply refused to convict appellant of stealing where no one saw him take the goods. But they had no difficulty in convicting him of possessing the goods, knowing they were stolen, where the evidence showed that he had them in his unexplained possession soon after the theft and where he sold them for a fraction of their market value in an obscure coffee shop.

Appellant asks for a reversal on the “teachings” of the *Prince* case, *supra*. It is inconceivable that the Supreme Court would have overruled the established law of five Circuits without mentioning one of their cases.

Significantly, the decisions in all Circuits have been cited with approval by this Court.

Thomas v. United States, 249 F. 2d 429 (9th Cir., 1957).

III.

The Government Proved Beyond a Reasonable Doubt That the Property Had a Value in Excess of \$100.

The Government introduced the invoice of the seller, Paillard Products, Inc., Los Angeles, as Government Exhibit No. 2 [Tr. 32]. The invoice was prepared in New York from information supplied by Los Angeles and a copy was sent to Los Angeles [Tr. 21-22]. The invoice showed that the seller billed the Great Western Camera Exchange in Denver \$84.06 for the camera and one lens [Tr. 27-28], and \$35 for the other lens [Tr. 31]. These were prices which a willing buyer agreed to pay a willing seller. The invoice also showed list prices of \$134.50 and \$52.50, respectively [Tr. 27, 31]. The goods were fair traded [Tr. 98].

Miss Lida Stefan, the office manager for Paillard Products in Los Angeles, stated that in her seven years

with the company she had learned the prices of various cameras [Tr. 97-98]. She said that the camera and one lens had a fair market value of \$139, and that the other lens had a fair market value of \$52.50 [Tr. 99].

Defendant cites 18 U. S. C. §2311 for a definition of value. This definition is only applicable to Chapter 113 of Title 18, Sections 2311-7. Defendant also cites *Abbott v. United States*, 239 F. 2d 310 (5th Cir., 1956), a case decided under 18 U. S. C. §2314, for the proposition that market value "depends on a market, whether formal, or informal, in which willing buyers bargain with willing sellers." The Government feels that such a value in excess of \$100.00 was proved.

However, it should be pointed out that in Chapter 31 of Title 18, Section 641-663, Congress used a much broader definition of value in setting forth the dividing line for penalties in the theft of Government property. 18 U. S. C. §641 provides that:

"The word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater" (italics added).

So if the Court feels that market value in excess of \$100.00 was not proved the Court should find that there was sufficient evidence of cost price and wholesale or retail price in excess of that figure.

Appellant argues that the property was "invoiced in New York for sale in Wyoming and defendant charged with its possession in Los Angeles." He says: "The wit-

ness Stefan . . . had no retail experience in Los Angeles or elsewhere . . . Clearly there was no evidence of the Los Angeles reasonable market value except that of the Government's witness Silver who fixed it at not more than \$40.00" (Appellant's Brief, pp. 14-15). However, Berny Silver, at one point said, "To be honest with you, I had no idea what the camera was worth" [Tr. 75]. So appellant's argument boils down to this: that market value means the price which a dupe buyer will pay a willing fence for hot property in the city where the fence decides to sell it. It could not be the price which a willing retailer would pay a willing wholesaler before it was stolen in the city where the seller is located because, according to appellant, the retailer "might" want to sell it at a loss in some other city. Appellant makes a mockery of market value.

IV.

The Government Proved Beyond a Reasonable Doubt That Appellant Knowingly Possessed Stolen Property.

The Government showed that the appellant sold goods with a fair market value of \$119.06, and a fair trade list price of \$187, for \$40, to an uninformed buyer in an obscure coffee shop soon after the theft. The Government need not prove more.

Cf. Najjar v. United States, 152 F. 2d 965 (5th Cir., 1946);

Nabutin v. United States, 8 F. 2d 491 (7th Cir., 1925), cert. den. 269 U. S. 585 (1925).

Conclusions.

1. Appellant was not denied the right to assistance of counsel under the Sixth Amendment.

2. Acquittal on the theft count did not amount to an acquittal on the possession count.

3. The Government proved beyond a reasonable doubt that the property had a market value in excess of \$100.

4. The Government proved beyond a reasonable doubt that appellant knowingly possessed stolen property.

Respectfully submitted,

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ROBERT D. HORNBAKER,
*Assistant U. S. Attorney,
Attorneys for Appellee.*



IN THE
United States
Court of Appeals
For the Ninth Circuit

WAYNE JOHNSON

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

Appeal from the United States District Court
for the District of Arizona

BRIEF OF APPELLEE

JACK D. H. HAYS

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Assistant United States Attorney

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IN THE
United States
Court of Appeals
For the Ninth Circuit

WAYNE JOHNSON

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

Appeal from the United States District Court
for the District of Arizona

BRIEF OF APPELLEE

STATEMENT OF FACTS

This appeal arises by reason of the denial by the United States District Court for the District of Arizona of the appellant's Petition under 28 U.S.C. § 2255 to vacate and set aside a judgment of conviction and sentence of life imprisonment imposed by the District Court in January, 1957.

On September 15, 1958, the District Court held a hearing on the Petition of the appellant to vacate and set aside his conviction and sentence. The appellant appeared in person, represented by appointed counsel, and evidence was offered by both the appellant and the Government.

The evidence, viewed in the light most favorable to the prevailing party (*Paramount Pest Control Service vs. Brewer*, 9 Cir., 177 F. 2d 564), shows that the appellant was indicted for murder in the first degree in October, 1956 (TR (Transcript of Record) 1). Named with the appellant as co-defendants were two others, Leroy Lewis and Burton Lopez (TR 1). Appellant Johnson was represented by Harold Kautz, an attorney employed through appellant's mother. The other defendants were represented by Court-appointed counsel (TR 3, TP (Transcript of Proceedings) 3).

The appellant and co-defendants were arraigned on October 22, 1956, and each of them entered a plea of not guilty to the indictment (TR 3). Thereafter, the attorney for the appellant, Mr. Harold Kautz, undertook to learn all that he could about the facts of the case. He had conferred with the appellant prior to arraignment and he continued to confer with the appellant from time to time thereafter. The total time taken up by these interviews with the appellant occupied some six to eight hours (TP 30). In addition, Mr. Kautz conferred with Mr. Ragan and Mr. Rodgers, attorneys appointed by the Court, to defend the co-defendants, Leroy Lewis and Burton Lopez (TP 31). These conferences with the attorneys for the co-defendants were undertaken to determine their expected testimony (TP 31).

In addition to conferring with the attorneys for the co-defendants, Mr. Kautz also conferred with the Assistant United States Attorney handling the case for the Government (TP 32), and the Government's attorney showed Mr. Kautz copies of the statement given by the appellant to the Federal Bureau of Investigation (TR 32, Ex 1) and the statement given by the co-defendant, Leroy Lewis, to the Federal Bureau of Investigation (Ex 2, TR 35).

After the interviews with the appellant, the conferences with the various attorneys, and examination of the statements made by the appellant and the co-defendants, it was the professional opinion of Mr. Kautz that there was a strong possibility that the appellant might be convicted of murder in the first degree, and in such event it was entirely possible that a verdict of death would be given by the jury (TR 34). It was Mr. Kautz's opinion that the appellant's version of the events that he had invited the deceased over to the automobile, knowing that the others intended to take him out on the desert and beat him up, was sufficient to involve the appellant Johnson in the actions of the others. Mr. Kautz advised the appellant to plead guilty to murder in the second degree.

Mr. Kautz advised the appellant that the maximum punishment for second degree murder was life imprisonment (TP 25 and 34), but he also advised the appellant that he could get anywhere from life to ten years (TP 25).

On December 10, 1956, the appellant Wayne Johnson appeared before the Court, together with a co-defendant, Leroy Lewis, and both withdrew their pleas of not guilty and entered pleas of guilty to murder in the second degree (TR 11). The Court specifically advised the appellant Johnson that he could be subject to a life penalty, and the appellant stated that he understood that this was a fact (TR 8).

The sentencing of appellant took place on January 28, 1957, at which time appellant and co-defendant Leroy Lewis were sentenced to life imprisonment (TR 13 and 18).

ISSUE PRESENTED

The issue presented by this appeal is whether the findings of the District Court that the appellant was

represented by competent counsel and entered a voluntary plea of guilty to a criminal charge are supported by competent evidence.

ARGUMENT

The statute under which appellant seeks relief reads in part:

28 U.S.C. § 2255.

“A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.”

☆ ☆ ☆ ☆

Pursuant to the requirements of the above section, the District Court held a hearing, made findings of

fact and conclusions of law, and after considering the evidence the Court denied the appellant's Petition.

The remedy provided by Title 28 U.S.C. § 2255 is a special civil proceeding rather than a criminal proceeding, and the burden of establishing a basis from relief under one or more of the grounds set forth in the section is upon the petitioner.

Hastings v. United States, 9 Cir., 184 F. 2d 939, 940

Taylor v. United States, 229 F. 2d 826

United States v. Trumblay, 234 F. 2d 273, 275

On appeal the findings of the District Court in civil proceedings will not be set aside unless they are clearly erroneous.

Paramount Pest Control Service v. Brewer, 9 Cir., 177 F. 2d 564

Rule 52, Federal Rules of Civil Procedure

The appellant's main contention seems to be that he was represented by incompetent counsel, so in effect he was deprived of counsel contrary to the Sixth Amendment to Constitution of the United States. But mere dissatisfaction with the results obtained through the efforts of an attorney is insufficient to invoke the protection of the Sixth Amendment to the Constitution.

Kinney v. United States, 177 F. 2d 895, 897

In considering the contentions of the appellant, it must be pointed out that his conviction came about by his plea of guilty.

"... While the accused may have to take the consequences of a poor defense, he may at least say the fault was not his own. But this is not so when he pleads guilty. Here the deed is his own; here there are not the baffling complexities which require a lawyer for illumination; if voluntarily and understandingly made, even a layman should expect a plea of guilty to be treated as an honest confession of

guilt and a waiver of all defenses known and unknown. And such is the law. A plea of guilty may not be withdrawn after sentence except to correct a 'manifest injustice,' and we find it difficult to imagine how 'manifest injustice' could be shown except by proof that the plea was not voluntarily or understandingly made, or a showing that defendant was ignorant of his right to counsel. Certainly ineffective assistance of counsel, as opposed to ignorance of the right to counsel, is immaterial in an attempt to impeach a plea of guilty, except perhaps to the extent that it bears on the issues of voluntariness and understanding."

Edwards v. United States, 256 F. 2d 707, 709

But was Mr. Kautz, appellant's counsel, actually ineffective? Even viewing the matter with hindsight, the Government contends that Mr. Kautz acted diligently and faithfully throughout his representation of appellant, and his effectiveness may be judged by the fact that he saved appellant from a very possible death sentence.

When Mr. Kautz was employed, appellant had already given a very damaging statement to the Federal Bureau of Investigation (TR 32, Ex 1). By conferring with counsel for the co-defendants, Mr. Kautz learned that the others were blaming appellant for the most serious elements of the crime (TP 33, TR 28, Ex A). These co-defendants had given statements to the Federal Bureau of Investigation, and Mr. Kautz contacted the United States Attorney's office to see these statements (TP 32, Ex 2, TR 35).

Mr. Kautz conferred with appellant several times for a total of six or eight hours (TR 30). What was said is not known since the appellant asserted the privilege of attorney-client (TP 27-29). The appellant states that he lied to his attorney, Mr. Kautz (TP 17), by telling him that the deceased had been called to

appellant's car by the appellant himself (TP 11). This was important because the trend of the evidence seemed to be that those with appellant wanted to take the deceased out in the desert and beat him. But appellant admits that he knew the others wanted to fight the deceased.

Q And that you were induced to turn around and go get Willard Dean Antone?

A Yes, I was talked into it.

Q You were talked into it?

A Yes.

Q You knew that the boys wanted to fight him, or hurt him?

A Yes.

Q But you then drove back to the Last Chance Tavern?

A I drove back just to satisfy these guys that wanted to pick him up.

Q Right.

A And going back, I didn't have no intention of picking the guy up.

Q He got into the car?

A Yes.

Q You say you told your lawyer that you called him over?

A Yes, I told him.

Q But that isn't really what you meant. Did you call him over?

A No, I didn't call him.

Q But you told your lawyer you called him over?

A Yes.

(TP 15-16)

It appears that appellant actually did call the deceased to the car.

This first beating was not the last of the incident, for, after appellant and his companions left the deceased in the desert, they returned to the deceased where the last and fatal beating took place (TP 17, TR 32-35, Ex 1 and 2).

Mr. Kautz, in representing the appellant, represented the only adult in the case, for the co-defendants were each 17, and the two other individuals in the case were 15 years of age (TP 14-15). The appellant was 27 years old at the time (TP 15).

Mr. Kautz knew that the Government did not need to rely on appellant's confession because the testimony of the co-defendants could be used against appellant plus that of the 15-year olds who were already serving their term in the Federal Institution for Juveniles (TR 16).

Appellant makes much of Mr. Kautz's statement (TP 37) that he was satisfied the Government had evidence that appellant had a substantial part in the events leading up to the death of the deceased, but as to the proof he could not say. The Government believes that Mr. Kautz's statement should not be construed to mean that he doubted whether the Government could prove the appellant's participation in the crime. The question to Mr. Kautz was whether the Government had proof of appellant's *substantial* participation in the death of the deceased. Mr. Kautz throughout was convinced that appellant could be convicted as an aider and abettor (TR 29, Ex A) for his part in the crime. Mr. Kautz in using the word "proof" meant the word in the sense of the final conclusion drawn from evidence, and in this sense he could not say positively whether the jury would find one way or the other, but Mr. Kautz already testified as to the probabilities facing appellant, namely, a death penalty (TP 26, 34).

Considering all the evidence which was available against appellant, Mr. Kautz advised the appellant to plead guilty to murder in the second degree. The Government contends that the whole record not only fails to show that Mr. Kautz was incompetent, but on the contrary the record shows the workings of a diligent and faithful counsel.

One point remains to be discussed, and that is whether the appellant was misled as to the sentence he could receive for his plea. There is a dispute in the evidence as to what appellant was advised by his counsel concerning the term of sentence. Appellant claims that he was told by Mr. Kautz that he would probably not get more than 10 years (TP 5).

At the time the appellant changed his plea, the District Court specifically warned appellant that he could be given a life penalty (TR 8). The fact that appellant may have ignored the warning is not a matter to complain of now.

The most important fact which marks appellant's testimony a callous lie in this whole matter is the fact of the efforts that his counsel Mr. Kautz was going to try to arrange for a so-called "truth serum test." What was the purpose?

THE WITNESS: We had a stipulation orally between myself and the U. S. Attorney that after the plea of Guilty to second degree murder, we would be privileged to have the truth serum tests made for what effect they would have on the sentence.

(TP 47-48)

Again Mr. Kautz states:

Q What is your recollection as to what you told him you thought he could get? Not "could", but "would" get?

A Well, from Life, I would say, down to ten years. It was very hard to determine, because there were

some horrible elements in the crime, which it was just a question of whether we could convince the Probation officer or the Court that Wayne had not had a part in. (TP 37)

The District Court by his findings showed that he believed Mr. Kautz rather than appellant, and the Government contends the evidence in record supports the position of the District Court.

Appellant admits that he knew that he was pleading guilty to second degree murder (TP 23). The exhibit offered in support of his petition (Ex A) shows appellant's understanding of his plea:

Since Wayne was the eldest of the Defendants, and since the other accused repeatedly blamed Wayne for the most serious elements of the crime, the federal attorney refused to consider any reduction in plea for Wayne other than second degree murder. Since this avoided the death penalty, I discussed the matter in detail with Wayne, and he decided he would plead guilty to second degree murder, although several times he asked me to see if we could secure agreement to any less charge. (TR 29-30)

CONCLUSION

Appellant was represented by competent counsel at the time of his plea of guilty and at the time of sentence. If his counsel was acting on any misinformation as to the amount of appellant's participation in the crime it was the fault of appellant in lying to his counsel, and appellant cannot now be heard to complain.

The whole record shows that appellant knew and understood the meaning of his plea of guilty to second degree murder, and the record supports the position

of the District Court that appellant understood the possible consequences of his plea of guilty.

Respectfully submitted,

JACK D. H. HAYS

United States Attorney

WILLIAM A. HOLOHAN

Assistant United States Attorney

Attorneys for Appellee

No. 16374

✓ SEE ALSO

United States
Court of Appeals
for the Ninth Circuit

3107

PACIFIC TOW BOAT COMPANY, E. W.
STUCHELL, WILLIAM D. CARPENTER,
HARRY W. STUCHELL, JR.; M. A. WY-
MAN, D. E. WYMAN and M. H. WYMAN,
Co-Partners Doing Business as Eclipse Lumber
Co.,

Appellants.

VS.

STATES MARINE CORPORATION OF DELA-
WARE,

Appellee.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 288)

Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

FILED

JUN 11 1929

No. 16374

United States
Court of Appeals
for the Ninth Circuit

PACIFIC TOW BOAT COMPANY, E. W.
STUCHELL, WILLIAM D. CARPENTER,
HARRY W. STUCHELL, JR.: M. A. WY-
MAN, D. E. WYMAN and M. H. WYMAN,
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United States District Court, Western District of
Washington, Northern Division

In Admiralty No. 16271

STATES MARINE CORPORATION OF DELA-
WARE, a Corporation,

Libelant,

vs.

Motor Vessel LEA MOE, Official Number 241972,
Her Engines, Tackle, Apparel and Furniture;
Barge E-15, Her Fittings and Equipment;
THE PACIFIC TOW BOAT COMPANY, a
Corporation; E. W. STUCHELL, WILLIAM
D. CARPENTER, HARRY W. STUCHELL,
JR., M. A. WYMAN, D. E. WYMAN and M.
H. WYMAN, Doing Business as ECLIPSE
LUMBER CO., an Unincorporated Company,

Respondents.

LIBEL IN REM AND
IN PERSONAM

The libel of the above-named libelant against the
above-named respondent vessels Lea Moe and
Barge E-15, and against the above-named respond-
ent The Pacific Tow Boat Company, a corporation,
and E. W. Stuchell, William D. Carpenter, Harry
W. Stuchell, Jr., M. A. Wyman, D. E. Wyman and
M. H. Wyman, doing business under the assumed
trade name of Eclipse Lumber Co., respondents, in
a cause of collision damage, civil and maritime, re-
spectfully shows:

I.

That said libelant at all times material was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware and was and now is the owner and operator of the SS Cotton State, official number 249027, a merchant vessel of the United States of 6103 gross tons and 3515 net tons; registered length 438.9 feet and breadth 63.1 feet.

II.

That respondent vessel Lea Moe is a merchant vessel of the United States, official number 241972 of 42 gross tons and 28 net tons; registered length, 60.9 feet, and breadth, 18.8 feet, designed and constructed for operation as a tug or towing vessel and owned and operated by The Pacific Tow Boat Company, a corporation.

III.

Barge E-15 is a merchant vessel of the United States, being a cargo barge of wood construction and dimensions of approximately 100 feet length by 38 feet beam by 11 feet depth, owned and operated by Eclipse Lumber Co., an unincorporated business, which is owned and operated by E. W. Stuchell, William D. Carpenter, Harry W. Stuchell, Jr., M. A. Wyman, D. E. Wyman and M. H. Wyman, under the aforesaid assumed trade number.

IV.

The Pacific Tow Boat Company now is and at all times material was a corporation organized un-

der and by virtue of the laws of the State of Washington with an office and place of business in the City of Everett, Washington, and said corporation was and now is the owner and operator of the respondent tug Lea Moe.

V.

That E. W. Stuchell, William D. Carpenter, Harry W. Stuchell, Jr., M. A. Wyman, D. E. Wyman and M. H. Wyman now are and at all times material were residents of Snohomish County and/or King County, Washington, and now are and at all times material were doing business under the assumed trade name of Eclipse Lumber Co., which company was the registered owner of the aforesaid respondent Barge E-15. That respondent Barge E-15 was at all times material employed and operated in the business of these respondents under the trade name of Eclipse Lumber Co.

VI.

That on 10 January, 1957, at or about 1845 hours the SS Cotton State was moored at the south side of Pier No. 1, Port of Everett, Washington. That at said time and place the respondent tug Lea Moe while operating under its own power and while having in its possession and control respondent barge E-15, was so negligently navigated, and Barge E-15 was so negligently controlled and maneuvered as to allow said Barge E-15 to drift under the stern counter and to collide with respondent's stationary and moored SS Cotton State, striking the propel-

ler and other portions of libelant's vessel and causing damages as hereinafter enumerated.

VII.

That as a proximate consequence of the negligence of respondents and each of them, libelant has sustained damages in the approximate amount of \$25,000 so far as is now known, including cost of dry-docking inspection and survey, cost of installation of spare propeller, cost of repair of damaged wheel and eventual reinstallation aboard the vessel, together with incidental expenses, including demurrage to the vessel, extra pilotage, towage and watchman service and general average expenses upon behalf of libelant's vessel and the cargo aboard. That although demand for payment of said damages has been made, no part has been paid.

VIII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the above-entitled court.

Wherefore, libelant prays:

(1) That process in rem may issue against the respondent vessel *Lea Moe*, her engines, tackle, apparel, furniture, etc., and against the respondent Barge *E-15*, her fittings and equipment and that all persons having or claiming any interests in either of said vessels be cited to appear and answer under oath all and singular to the allegations aforesaid;

(2) That this Honorable Court adjudge and decree that said respondent vessels pay libelant its damages, and that the respondent vessels be condemned and sold to satisfy said judgment and decree.

(3) That process in due form of law according to the practice of the above-entitled court in causes of admiralty and maritime jurisdiction be issued in personam against the respondents, The Pacific Tow Boat Company, a corporation, and against E. W. Stuchell, William D. Carpenter, Harry W. Stuchell, Jr., M. A. Wyman, D. E. Wyman and M. H. Wyman, doing business under the assumed trade name of Eclipse Lumber Co., to appear and answer on oath the matters and things aforesaid.

(4) That this Honorable Court adjudge and decree that said respondents pay to the libelant its damages as aforesaid with interest and costs.

(5) That the court grant to this libelant such other and further relief as may be just and proper in the premises.

SUMMERS, BUCEY &
HOWARD,

(s) CHARLES B. HOWARD,
Proctors for Libelant.

Duly verified.

[Endorsed]: Filed January 28, 1937.

[Title of District Court and Cause.]

APPEARANCE OF PROCTORS

To the Clerk of the Above-Entitled Court:

Will you please enter our appearance as proctors for claimant and respondent, The Pacific Tow Boat Company, in the above-entitled cause and direct service of all serviceable papers, except writs and processes, may be made upon said claimant and respondent by leaving the same with

BOGLE, BOGLE & GATES,
/s/ EDWARD C. BIELE,
Proctors for Claimant and
Respondent.

Receipt of copy acknowledged.

[Endorsed]: Filed January 31, 1957.

[Title of District Court and Cause.]

APPEARANCE

To: The Clerk of the Above-Entitled Court:

You will please enter our Appearance for claimants and respondents, E. W. Stuchell, William D. Carpenter, Harry W. Stuchell, Jr., M. A. Wyman, D. E. Wyman, and M. H. Wyman, co-partners doing business as Eclipse Lumber Co., in the above-entitled cause and service of all serviceable papers, except returns and processes may be made upon claimants by leaving the same with:

GRAHAM, GREEN & DUNN,

/s/ BRYANT R. DUNN,

/s/ BEN J. GANTT, JR.,

Proctors for Respondents and Claimants, E. W.
Stuchell, et al., d/b/a Eclipse Lumber Co., a
Partnership.

Receipt of copy acknowledged.

[Endorsed]: Filed February 1, 1957.

[Title of District Court and Cause.]

ANSWER OF THE PACIFIC
TOW BOAT COMPANY

To: The Honorable Judges of the Above-Entitled
Court:

The Answer of The Pacific Tow Boat Company, a corporation, to the Libel of States Marine Corporation of Delaware, a corporation, in an alleged cause of collision damage, civil and maritime, admits, denies and alleges as follows:

I.

It is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph I of the Libel and, therefore, denies them.

II.

It admits the matters alleged in Paragraph II of the Libel.

III.

It admits the matters alleged in Paragraph III of the Libel.

IV.

It admits the matters alleged in Paragraph IV of the Libel.

V.

It admits the matters alleged in Paragraph V of the Libel.

VI.

It admits that on January 10, 1957, at or about 1845 hours the SS Cotton State was moored at the south side of Pier No. 1, Port of Everett, Washington. It also admits that at or about that time the barge E-15 struck the propeller of the SS Cotton State. It denies each and every other matter alleged in Paragraph VI of the Libel.

VII.

It denies that as the proximate consequence of its negligence, or of the Motor Vessel Lea Moe, or of anyone for whom it is responsible that Libelant sustained any damages whatsoever. It admits demand and its refusal of payment.

VIII.

It admits the admiralty and maritime jurisdiction of this Honorable Court. It denies the other matters alleged in Paragraph VIII of the Libel.

Wherefore, The Pacific Tow Boat Company prays that the Libel herein against it be dismissed with prejudice and with costs, and that it may have such other and further relief as may be just and proper in the premises.

BOGLE, BOGLE & GATES,
/s/ CLAUDE E. WAKEFIELD,

/s/ EDWARD C. BIELE,

Proctors for Claimant-Respondent The Pacific
Tow Boat Company.

Receipt of copy acknowledged.

[Endorsed]: Filed February 6, 1957.

[Title of District Court and Cause.]

RELEASE AND COST BOND

Know All Men by These Presents:

That the undersigned principal and the undersigned surety are held and firmly bound unto the United States Marshal for the Western District of Washington, his heirs, executors, administrators or legal representatives, in the penal sum of Thirty Thousand Two Hundred Fifty (\$30,250.00) Dollars, lawful money of the United States, for the payment thereof to the benefit of whom it may concern; the said principal and the said surety bind themselves, their successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of January, 1957.

The conditions of this obligation are such, that

Whereas, the above-named respondent motor vessel Lea Moe is in the custody of the United States Marshal for the Western District of Washington under process issued in pursuance of the prayer of the libel filed in this Court and cause; and

Whereas, the undersigned principal is filing its claim of ownership to the said respondent motor

vessel Lea Moe and is applying for release thereof in accordance with the Admiralty rules and practices of the above-entitled court and is filing its appearance in the above-entitled cause;

Now, Therefore, the condition of this obligation is such that if the undersigned principal shall abide by and answer final decree in the above-entitled cause, and pay the money awarded thereby, including all costs and expenses, not exceeding the sum of Thirty Thousand Two Hundred Fifty (\$30,250.00) Dollars, which shall be awarded against it by the final decree of this court, or by any appellate court, if any appeal intervenes, then this obligation shall be void, otherwise it shall remain in full force and effect.

[Seal] THE PACIFIC TOW BOAT
COMPANY,

By /s/ H. O. FOSS,
Its President, Principal;

[Seal] FOSS LAUNCH & TUG CO.,

By /s/ H. O. FOSS,
Its President, Surety.

The foregoing bond is hereby approved as to form, amount and surety, and notice of bonding is hereby waived and consent given that the motor vessel Lea Moe be immediately released from attachment thereof by the United States Marshal upon filing of this bond without order of court.

SUMMERS, BUCEY &
HOWARD,

By /s/ CHARLES B. HOWARD.

[Title of Cause.]

MARSHAL'S RETURN ON RELEASE AND
COST BOND (M/V LEA MOE)

I hereby certify and return that in accordance with the attached Release and Cost Bond, I did release the Motor Vessel Lea Moe, official number 241972, her engines, tackle, apparel and furniture, at Everett, Washington, at 6:30 p.m., February 1, 1957.

W. B. PARSONS,

U. S. Marshal, Western

District of Washington;

By /s/ DONALD F. MILLER,

Chief Deputy

U. S. Marshal.

Marshal's costs, \$7.60.

Receipt of copy acknowledged.

[Endorsed]: Filed February 6, 1957.

[Title of District Court and Cause.]

RELEASE AND COST BOND—(BARGE E-15)

Know All Men by These Presents:

That the undersigned principals and the undersigned sureties, E. W. Stuchell and D. E. Wyman, are held and firmly bound unto the United States Marshal for the Western District of Washington,

his heirs, executors, administrators or legal representatives, in the penal sum of Thirty Thousand Two Hundred Fifty Dollars (\$30,250.00), in lawful money of the United States, for the payment thereof to the benefit of whom it may concern; the said principals and the said sureties bind themselves, their successors and assigns, jointly, and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of January, 1957.

The conditions of this obligation are such, that

Whereas, the above-named respondent Barge E-15 is in the custody of the United States Marshal for the Western District of Washington under process issued in pursuance of the prayer of the libel filed in this Court and cause; and

Whereas, the undersigned principals are filing their claim of ownership to the said respondent Barge E-15 and are applying for release thereof in accordance with the Admiralty rules and practices of the above-entitled court and is filing its appearance in the above-entitled cause;

Now, Therefore, the condition of this obligation is such that if the undersigned principals shall abide by and answer the final decree rendered by this Court in the above-entitled cause, or any appellate court, if any appeal intervenes, and pay the money awarded thereby, including all costs and expenses, not exceeding the sum of Thirty Thousand Two Hundred Fifty Dollars (\$30,250.00),

which shall be awarded against them by the final decree of this Court, or by any appellate court, if any appeal intervenes, then this obligation shall be void, otherwise it shall remain in full force and effect.

E. W. STUCHELL,
WILLIAM D. CARPENTER,
HARRY W. STUCHELL, JR.,
M. A. WYMAN,
D. E. WYMAN, and
M. H. WYMAN,
Doing Business as Eclipse
Lumber Co., a Partnership;

GRAHAM, GREEN & DUNN,

By /s/ BEN GANTT, JR.,
Their Proctor, Principals;

/s/ E. W. STUCHELL,

/s/ D. E. WYMAN,
Sureties.

United States of America,
Western District of Washington,
County of Snohomish—ss.

On this day personally appeared before me, E. W. Stuchell, to me known to be one of the individuals described in and who executed the within and foregoing Release and Cost Bond, and acknowledged that he signed the same as his free and

voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 30th day of January, 1957.

[Seal] /s/ L. R. JOHNSON,
Notary Public in and for the State of Washington,
Residing at Everett.

United States of America,
Western District of Washington,
County of King—ss.

On this day personally appeared before me D. E. Wyman, to me known to be one of the individuals described in and who executed the within and foregoing Release and Cost Bond, and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 30th day of January, 1957.

[Seal] /s/ BEN J. GANTT, JR.,
Notary Public in and for the State of Washington,
Residing at Seattle.

The foregoing bond is hereby approved as to form. amount and surety, and notice of bonding is hereby waived, and consent given that the Barge E-15 be immediately released from the attachment

thereof by the United States Marshal upon the filing of this bond without order of court.

SUMMERS, BUCEY &
HOWARD,

By /s/ CHARLES B. HOWARD,
Proctors for Libelant.

AFFIDAVIT OF E. W. STUCHELL

State of Washington,
County of Snohomish—ss.

E. W. Stuchell being first duly sworn, on oath deposes and says:

That he is a resident of the Western District of Washington having his residence at Everett, Washington; that he is one of the individual sureties in the above and foregoing Release and Cost Bond; that he owns property within the Western District of Washington, the value of which is double the amount of said Release and Cost Bond, and above all liabilities and exemptions; this Affidavit is given in compliance with Rule 17 of the local Admiralty rules of the United States District Court for the Western District of Washington.

/s/ E. W. STUCHELL.

Subscribed and Sworn to before me this 30th day of January, 1957.

[Seal] /s/ L. R. JOHNSON,
Notary Public in and for the State of Washington,
Residing at Everett.

AFFIDAVIT OF D. E. WYMAN

State of Washington,
County of King—ss.

D. E. Wyman, being first duly sworn, on oath, deposes and says:

That he is a resident of the Western District of Washington having his residence at Seattle, Washington; that he is one of the individual sureties in the above and foregoing Release and Cost Bond; that he owns property within the Western District of Washington, the value of which is double the amount of said Release and Cost Bond, and above all liabilities and exemptions; this Affidavit is given in compliance with Rule 17 of the local Admiralty rules of the United States District Court for the Western District of Washington.

/s/ D. E. WYMAN.

Subscribed and Sworn to before me this 30th day of January, 1957.

[Seal] /s/ BEN J. GANTT, JR.,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Title of Cause.]

**MARSHAL'S RETURN ON RELEASE AND
COST BOND (BARGE E-15)**

I hereby certify and return that in accordance with the attached Release and Cost Bond (Barge E-15), I did release the Barge E-15, her fittings and equipment, at Everett, Washington, on the 1st day of February, 1957, at 1:30 p.m. o'clock.

W. B. PARSONS,

U. S. Marshal, Western
District of Washington;

By : DONALD F. MILLER,

Chief Deputy U. S. Marshal.

Marshal's costs: \$7.20.

Receipt of copy acknowledged.

[Endorsed]: Filed February 6, 1957.

[Title of District Court and Cause.]

ANSWER OF E. W. STUCHELL, ET AL.

To the Honorable Judges of the Above-Entitled
Court:

The answer of E. W. Stuchell, William D. Car-
penter, Harry W. Stuchell, Jr., M. A. Wyman, D.
E. Wyman and M. H. Wyman, co-partners doing

business as Eclipse Lumber Co. in an alleged cause of collision, damage, civil and maritime, admit, deny and allege as follows:

I.

They admit the matters alleged in paragraph I of the libel.

II.

They admit the matters alleged in paragraph II of the libel.

III.

They admit that at the time mentioned in the libel they were the bare boat charterers in possession of the screw Eclipse No. 15, official number 369953, a merchant vessel of the United States of wooden construction, 392 gross and net tons, 120.4 feet length, and 31.4 feet breadth.

IV.

They admit the matters alleged in paragraph IV of the libel.

V.

They admit they now are and at all times mentioned in the libel were residents of Snohomish County and/or King County, Washington, and now are and were doing business as co-partners under the name of Eclipse Lumber Co., which was the bare boat charter in possession and operator of the screw Eclipse No. 15.

VI.

They deny the matters alleged in paragraph VI of the libel except such as shall be hereinafter specifically admitted.

VII.

They deny the matters alleged in paragraph VII of the libel and that libelant sustained any damages whatsoever. They admit demand and refusal of payment.

VIII.

They admit the admiralty and maritime jurisdiction of this Honorable Court. They deny the other matters alleged in paragraph VIII of the libel.

IX.

Further answering, and as a separate defense, they allege as follows:

That on the evening of January 10, 1957, the SS Cotton State was berthed at the south side of Pier No. 1, Port of Everett, Washington. While so berthed the tug Lea Moe brought the dumb scows Eclipse No. 15 and Eclipse No. 25, laden with cross-libelants' lumber cargo, alongside the starboard side of the steamer. The scows were close coupled and in tandem with the No. 25 ahead and the No. 15 astern. Upon orders from those on the deck of the Cotton State the two scows were landed as directed and a line securing them was made fast by the mate on the deck of the steamer. Thereupon the Lea Moe maneuvered to shift position from the No. 25 to the No. 15 to take the latter in tow and shift

her as directed by those on the Cotton State. While said maneuver was being accomplished those on the deck of the Cotton State negligently failed to hold the scows in position alongside the steamer and her engineers negligently started up her turning or jacking gear without warning or observing the clearance astern in the vicinity of the propeller as required by prudent seamanship and practice. As a consequence of the negligent acts of the libelant's servants in charge of the SS Cotton State the No. 15 was permitted to drift into the rotating propeller, holing the scow, causing her to fill and to dump part of her cargo before prompt, efficient efforts of the tug Lea Moe cleared the scow from the propeller. The scow was then beached by the Lea Moe. Thereafter libelants were required to expend considerable moneys to salve their dumped lumber cargo, some of which was lost.

X.

That all and singular the premises are true.

Wherefore, E. W. Stuchell, William D. Carpenter, Harry W. Stuchell, Jr., M. A. Wyman, D. E. Wyman and M. H. Wyman, co-partners doing business as Eclipse Lumber Co., pray that the libel herein against them be dismissed with prejudice and with costs, and that they may have such other and further relief as may be just and proper in the premises.

GRAHAM. GREEN & DUNN.

/s/ BRYANT R. DUNN,

/s/ BEN J. GANTT, JR.,

Proctors for Respondents-Claimants, W. E. Stuchell, M. A. Wyman, D. E. Wyman and M. H. Wyman, d/b/a Eclipse Lumber Co., a Co-partnership.

Duly verified.

[Endorsed]: Filed October 28, 1957.

[Title of District Court and Cause.]

SUBSTITUTION OF PROCTORS

To the Clerk of the Above-Entitled Court:

The respondents-claimants, E. W. Stuchell, William D. Carpenter, Harry W. Stuchell, Jr., M. A. Wyman, D. E. Wyman and M. H. Wyman, co-partners, doing business as Eclipse Lumber Co., hereby substitute Bogle, Bogle & Gates, Central Building, Seattle, Washington, as their proctors in the above-entitled cause in the place and stead of Graham, Green & Dunn.

Dated this 25th day of February, 1958.

E. W. STUCHELL,
WILLIAM D. CARPENTER,
HARRY W. STUCHELL, JR.,
M. A. WYMAN,

D. E. WYMAN, and
M. H. WYMAN,
Co-partners, d/b/a Eclipse
Lumber Co.;

By /s/ E. W. STUCHELL,
A Partner.

We hereby consent to the substitution of Bogle, Bogle & Gates as proctors for the respondents-claimants E. W. Stuchell, William D. Carpenter, Harry W. Stuchell, Jr., M. A. Wyman, D. E. Wyman and M. H. Wyman, co-partners, doing business as Eclipse Lumber Co., in the above-entitled cause, in our place and stead.

Dated this 26th day of February, 1958.

GRAHAM, GREEN & DUNN,

By /s/ BRYANT R. DUNN,

/s/ BEN J. GANTT, JR.

We hereby agree to be substituted in the place of Graham, Green & Dunn in the above-entitled cause as proctors for the respondents-claimants, E. W. Stuchell, William D. Carpenter, Harry W. Stuchell, Jr., M. A. Wyman, D. E. Wyman and M. H. Wyman, co-partners, doing business as Eclipse Lumber Co.

Dated this 28th day of February, 1958.

BOGLE, BOGLE & GATES,

By /s/ CLAUDE E. WAKEFIELD,
/s/ EDWARD C. BIELE.

Receipt of copy acknowledged.

[Endorsed]: Filed February 28, 1958.

United States District Court, Western District of
Washington, Northern Division

In Admiralty—No. 16271

STATES MARINE CORPORATION OF DELA-
WARE, a Corporation,

Libelant,

vs.

Motor Vessel LEA MOE, Official Number 241972,
Her Engines, Tackle, Apparel and Furniture;
and Barge E-15, Her Fittings and Equipment,

Respondents,

and

THE PACIFIC TOW BOAT COMPANY, a Cor-
poration; and E. W. STUCHELL, WILLIAM
D. CARPENTER, HARRY W. STUCHELL,
JR., M. A. WYMAN, D. E. WYMAN and M.
H. WYMAN, Co-partners, Doing Business as
ECLIPSE LUMBER CO.,

Respondents-Claimants.

E. W. STUCHELL, WILLIAM D. CARPEN-
TER, HARRY W. STUCHELL, JR., M. A.

WYMAN, D. E. WYMAN and M. H. WYMAN, Co-partners, Doing Business as ECLIPSE LUMBER CO.,

Cross-Libelants,

vs.

STATES MARINE CORPORATION OF DELAWARE, a Corporation,

Cross-Respondent.

CROSS-LIBEL OF E. W. STUCHELL, ET AL.

To the Honorable Judges of the Above-Entitled Court:

The cross-libel of E. W. Stuchell, William D. Carpenter, Harry W. Stuchell, Jr., M. A. Wyman, D. E. Wyman and M. H. Wyman, co-partners, doing business as Eclipse Lumber Co., in a cause of collision, civil and maritime, alleges as follows:

I.

That cross-libelants now are and at all times herein mentioned were residents of Snohomish County and/or King County, State of Washington, and co-partners doing business as Eclipse Lumber Co.

II.

That cross-libelants now are and at all times herein mentioned were the bare boat charterers in possession and operators of the scow Eclipse No. 15, official number 169953, of wooden construction, 302 gross and net tons, 110.4 feet length, and 37.9 feet breadth. Cross-libelants at all times herein men-

tioned were the owners of a cargo of lumber laden aboard the said scow Eclipse No. 15.

III.

That States Marine Corporation of Delaware was and now is a corporation organized and existing under and by virtue of the Laws of the State of Delaware with an office and place of business in Seattle, Washington, and at all times material herein was the owner and operator of the SS Cotton State, official number 249027, a merchant vessel of the United States of 6,103 gross tons and 3,515 net tons; registered length 438.9 feet and breadth 63.1 feet.

IV.

That a libel was filed in this Court by Messrs. Summers, Bucey & Howard on or about January 30, 1957, on behalf of States Marine Corporation of Delaware as owner of the SS Cotton State against the scow Eclipse No. 15 (designated as Barge E-15), her fittings and equipment and cross-libelants as respondents claiming damages in the sum of \$25,000.00 arising out of a collision between the said scow and steamer. Cross-libelants have appeared and answered the said libel and claimed and obtained the release of the Eclipse No. 15.

V.

That the true facts and circumstances of the collision referred to in the aforesaid libel are as follows:

That on the evening of January 10, 1955, the SS Cotton State was berthed at the south side of Pier No. 1, Port of Everett, Washington. While so berthed the tug Lea Moe brought the dumb scows Eclipse No. 15 and Eclipse No. 25, laden with cross-libelants' lumber cargo, alongside the starboard side of the steamer. The scows were close coupled and in tandem with the No. 25 ahead and the No. 15 astern. Upon orders from those on the deck of the Cotton State the two scows were landed as directed and a line securing them was made fast by the mate on the deck of the steamer. Thereupon the Lea Moe maneuvered to shift position from the No. 25 to the No. 15 to take the latter in tow and shift her as directed by those on the Cotton State. While said maneuver was being accomplished those on the deck of the Cotton State negligently failed to hold the scow in position alongside the steamer and her engineers negligently started up her turning or jacking gear causing her propeller to rotate without warning or observing the clearance astern in the vicinity of the propeller as required by prudent seamanship and practice. As a consequence of the negligent acts of the libelant's servants in charge of the SS Cotton State the No. 15 was permitted to drift into the rotating propeller, holing the scow, and causing her to fill and to dump part of her cargo before prompt, efficient efforts of the tug Lea Moe cleared the scow from the propeller. The scow was then beached by the Lea Moe. Thereafter libelants were required to expend consider-

able moneys to salve their dumped lumber cargo, some of which was lost.

VI.

That the aforesaid collision and resulting damages were not caused through any fault, negligence or want of care on the part of the scows Eclipse No. 15 and Eclipse No. 25, or of any persons for whom cross-libelants were or are responsible, but were due solely to or caused solely by the faults and negligence of the servants and employees of States Marine Corporation of Delaware who were in charge of the SS Cotton State in the following respects, among others, to be proved at the trial hereof:

1. Those in charge of the Cotton State were not competent.

2. Those in charge of the Cotton State were not attentive to their duties.

3. Those in charge of the Cotton State failed to warn those on the tug Lea Moe that the propeller of said Cotton State was to be started without warning.

4. Those in charge of the Cotton State started up the propeller of the said vessel without warning.

5. Those in charge of the Cotton State failed to hold and secure the scows Eclipse No. 15 and Eclipse No. 25 in place when brought alongside by the tug Lea Moe.

6. Those in charge of the Cotton State did not have a sufficient crew available to tie up the scows Eclipse No. 15 and No. 25.

7. Those in charge of the Cotton State knew or should have known of the danger of collision between the scow Eclipse No. 15 and the rotating propeller of the steamer but negligently failed to warn those on the tug Lea Moe of said danger.

8. Those on the Cotton State failed to stop the rotating propeller when they knew or should have known of the danger of the damage.

9. Those in charge of the Cotton State started up her propeller without ascertaining whether her stern area was free and clear of the cross-libelants' scows.

10. In other respects which cross-libelants will specify upon completion of discovery proceedings herein.

VII.

That by reason of the aforesaid collision cross-libelants sustained damages including costs of repairs to the Eclipse No. 15, survey fees, towing charges, lost cargo, salvage expenses and other incidental costs in the sum of upwards of \$10,000.00 as nearly as can be estimated at this time, no part of which has been paid, although duly demanded.

VIII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, cross-libelants pray:

1. That process in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against States Marine Corporation of Delaware, a corporation, and that it be cited to appear and answer under oath all and singular the matters aforesaid;

2. That the cross-libelants may have a decree against States Marine Corporation of Delaware for their damages as aforesaid together with interest and costs;

3. That the libel proceeding of States Marine Corporation of Delaware above described be dismissed with prejudice and without costs;

4. That the cross-libelants may have such other, further and different relief as may be just in the premises.

BOGLE, BOGLE & GATES,

/s/ CLAUDE E. WAKEFIELD,

/s/ EDWARD C. BIELE,

Proctors of Cross-Libelants, E. W. Stuchell, William D. Carpenter, Harry W. Stuchell, Jr., M. A. Wyman, D. E. Wyman and M. H. Wyman, d/b/a Eclipse Lumber Co., a Co-partnership.

Duly verified.

[Endorsed]: Filed February 28, 1958.

[Title of District Court and Cause.]

ANSWER TO CROSS-LIBEL

To the Honorable Judges of the Above-Entitled Court:

Comes now the cross-respondent, States Marine Corporation of Delaware, a corporation, and for answer to the cross-libel of E. W. Stuchell, et al., as served upon proctors for cross-respondent on February 28, 1958, does admit, deny and allege as follows:

I.

Cross-respondent admits the allegations of Article I of the cross-libel.

II.

Answering Article II of said cross-libel, this cross-respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

III.

Cross-respondent admits the allegations of Article III of the cross-libel.

IV.

Cross-respondent admits the allegations of Article IV of the cross-libel.

V.

Answering Article V of said cross-libel, cross-respondent denies each and every allegation contained therein except only that cross-respondent ad-

mits that a collision occurred between the drifting barge Eclipse No. 15 and the rotating propeller of the SS Cotton State at Everett, Washington, on the evening of January 10, 1955, causing damage to both the vessel and the barge.

VI.

Answering Article VI of said cross-libel, this cross-respondent denies each and every allegation contained therein and particularly denies that the aforesaid collision and resulting damages were caused by any fault or negligence of the cross-respondent or those in charge of the SS Cotton State as therein alleged, or otherwise.

VII.

Answering Article VII of said cross-libel, this cross-respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

VIII.

Answering Article VIII of said cross-libel, this cross-respondent denies the same except only that it admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

First Affirmative Defense

For further answer and by way of a first affirmative defense to said cross-libel, cross-respondent alleges:

I.

That cross-libelants are guilty of laches and unreasonable delay in presenting this cross-libel more than 13 months after the occurrence of the accident and the filing of the libel in this cause.

Wherefore, cross-respondent prays that the cross-libel herein against it be dismissed with prejudice and with costs and that it have such other and further relief as may be just and proper in the premises.

SUMMERS, BUCEY &
HOWARD,

/s/ CHARLES B. HOWARD,
Proctors for Cross-
Respondent.

Duly verified.

[Endorsed]: Filed March 12, 1958.

[Title of District Court and Cause.]

PRETRIAL ORDER

As a result of Pretrial conferences conducted between libelant, represented by Summers, Bucey & Howard (Charles B. Howard of proctors), The Pacific Towboat Company, respondent, claimant represented by Bogle, Bogle & Gates (E. C. Biele and M. Bayard Crutcher of proctors) and respondents-claimants and cross-libelants E. W. Stuchell, et al., as co-partners doing business as Eclipse Lumber Co., represented by Bogle, Bogle & Gates

(E. C. Biele and M. Bayard Crutcher of proctors), the following matters were determined upon for the purpose of this Pretrial Order.

I.

Nature of Proceedings

This Admiralty action was commenced by Libel in Rem and in Personam filed in this Court on January 28, 1957. By the libel the States Marine Corporation of Delaware, as owner of the SS Cotton State seeks to recover damages as a result of an accident occurring while said vessel was moored at the Port Dock No. 1 at Everett, Washington, on January 10, 1957, when a scow known as Eclipse No. 15 bareboat chartered by the respondents Stuchell, et al., doing business as Eclipse Lumber Co., which was being towed by the respondent tug Lea Moe owned and operated by respondent The Pacific Tow Boat Company, came in contact with the propeller of the SS Cotton State, causing damages thereto.

Respondents and cross-libelants Stuchell, et al., doing business as Eclipse Lumber Co., assert by cross-libel against libelant their claim for damages sustained to scow Eclipse No. 15 in the same accident.

II.

Admitted Facts

(1) That libelant, States Marine Corporation of Delaware is a Delaware corporation and at all times

material was the owner and operator of the SS Cotton State a merchant vessel of 6103 gross and 3515 net tons, registered length 438.9 feet and breadth, 63.1 feet.

(2) That respondent and claimant The Pacific Tow Boat Company is a Washington corporation and at all times material was the owner and operator of the respondent tug Lea Moe, a Diesel powered vessel of 265 h.p., of 42 gross and 28 net tons, and of registered length 60.9 feet and breadth 18.8 feet, equipped with pilot house controls of the main engine.

(3) That respondents, claimants and cross-libelants E. W. Stuchell, et al., doing business as co-partners under the assumed name of Eclipse Lumber Co., were at all times material residents of Snohomish or King counties, state of Washington, and were the bareboat charterers of the two square-ended cargo scows Eclipse No. 15 and Eclipse No. 25 (hereinafter referred to as No. 15 and No. 25), each of which is of wood construction, length 110.4 feet and breadth 37.9 feet.

(4) That at the time of the filing of this action and of the service of the process of this court in rem and in personam the tug Lea Moe and the scow No. 15 were within the geographical jurisdiction of this Court, to wit: At Everett, Washington.

(5) That the Port Dock No. 1 of Everett is a public terminal in the harbor of Everett, Washing-

ton, extending into Puget Sound, within the geographical jurisdiction of this Court.

(6) That on January 10, 1957, at about 1845 hours, the SS Cotton State was moored by lines to the south side of Port Dock No. 1, Everett, Washington, having just arrived at said terminal under its own power from Seattle, Washington. Said vessel was moored bow in and stern out, with its port side against the south side of said terminal dock.

(7) That on the evening of January 10, 1958, the tug Lea Moe shifted the scows No. 15 and No. 25, loaded with lumber, from a mooring in Everett harbor to the offshore starboard side of the SS Cotton State. Said shift was made by the tug Lea Moe towing on a short hawser, extending for a distance from 8 to 10 feet over the stern of the tug to where it was attached to a stanchion at the forward starboard corner of scow No. 25. There were short coupling lines fastened between the two corner stanchions aft on the No. 25 and extending to the two forward corner stanchions on the No. 15 which was the after scow in the tandem tow. The two scows were close coupled with a foot or so clearance between them.

(8) That during the aforesaid shift of the scows No. 15 and No. 25 the tug Lea Moe was manned by a master and two deckhands. That neither scows No. 15 or No. 25 carried a crew or barge men. There were no employees of respondent Eclipse Lumber Co. aboard the tug or scows.

(9) That during the aforesaid shift weather was fair, a light southeasterly wind was blowing, and the stage of tide was approximately low water. Visibility was good. The tug Lea Moe was burning red and green side lights and towing lights on the mast. No other marine traffic was encountered by the tug Lea Moe in making the shift from West Cove to a point on the offshore or starboard side of the Cotton State at the slip on the south side of Port Dock #1.

(10) As the tug Lea Moe brought the leading scow to a position alongside the starboard-offshore side of the Cotton State, a mooring line was passed from the vessel which was secured by one of the deckhands of the tug Lea Moe to the starboard forward stanchion of the leading scow, #25. No other mooring lines were secured between the Cotton State and either scow #25 or #15 before the accident occurred.

(11) The Cotton State was equipped with an electrically-operated turning or jacking gear which was engaged by one of the engineers of the vessel sometime after the vessel arrived at Port Dock #1, Everett from Seattle. The use of this turning or jacking gear on the Cotton State resulted in the propeller making a complete turn in a period of seven to eight minutes. The turning or jacking gear of the Cotton State was in operation at the time of the accident in an astern rotation, causing the propeller to turn counterclockwise, looking from the stern.

(12) That sometime after the tug *Lea Moe* brought scows #25 and #15 along the offshore-starboard side of the *Cotton State*, the aftermost or trailing scow in the tow, to wit: #15 drifted under the stern counter of the *Cotton State* and came in contact with the propeller of the vessel as it was being rotated in the jacking or turning gear, causing damages to the propeller of the *Cotton State* and to scow #15 and its cargo of lumber as hereinafter described.

(13) That as a result of the aforesaid accident, the *Cotton State* and libelant as its owner sustained damages including: cost or repairs to three blades of the propeller, including drydocking for removal of the propeller, drawing and testing the tailshaft, and various incidental expenses such as extra pilotage, towage, watchmen's services, survey services, extra crew, subsistence and fuel, loss of earnings and revenue, and general average charges. That the total amount of the aforesaid damages of libelant and the *S. S. Cotton State* has been stipulated by all parties to be in the sum of \$22,500, and libelant will not be required to put in evidence any further proof as to the amount, reasonableness or justification for said damages.

(14) That as a result of the aforesaid accident, the respondents-claimants and cross-libelants *E. W. Stuchell et al.* doing business as *Eclipse Lumber Co.* and the scow #15 sustained damages including the cost of repairs on scow #15, extra towage, extra charges for recovering and reloading

lumber lost from the scow, rental of additional scow, extra labor and detention of stevedores, survey fees and other incidental charges. That the total amount of the aforesaid damages of the above-mentioned respondents, claimants and cross-libelants has been stipulated by all parties to be in the sum of \$9,789.25, and said parties will not be required to put in evidence any further proof as to the amount, reasonableness or justification for said damages.

(15) That each party sustaining damages as aforesaid has made demand upon other parties to this action for payment of said damages, but no part of said claims have been paid.

III.

Libelant's Contentions

(1) That the SS Cotton State was lawfully and properly moored to the south side of Port Dock #1, Everett, before and at the time of the occurrence of the accident in question.

(2) That immediately upon arrival of the Cotton State at Port Dock #1, Everett, on the evening of January 10, 1957, and prior to arrival of tug Lea Moe with scows #25 and #15 in tow at the slip or alongside the vessel, there were displayed from a position hanging over each side of the stern of the Cotton State to a point about 5 or 6 feet above the water line two wooden boards painted in red and white stripes approximately 9 feet long,

to each of which was attached a marine type light of 60 to 75 watts enclosed in a red glass cover. That said lights flashed red every three to four seconds. That above said flashing light boards there were mounted on each side of the handrail on the main deck at the stern boards approximately 5 feet long by 3 feet high, and on the side of each said board facing outboard was the legend "Keep Clear of Propeller" in letters 5 to 6 inches high, painted in red on a white background. That cluster lights were placed over the railing adjacent to and shining on each of said boards to illuminate the outboard side and lettering as above. That each of the above warnings was in place, lighted and operating at and immediately prior to the time when the tug Lea Moe came into the slip and alongside the off-shore-starboard side of the Cotton State and prior to the accident in question.

(3) That the turning or jacking gear in use aboard the Cotton State at the time of the accident is a device used on all steam turbine driven vessels to enable very slow rotation of the turbines, shaft and propeller for a period of several hours after the main engine has been in operation, so that the rotors in the turbine will cool down gradually and evenly and not cause damage to the machinery. That the use of the turning or jacking gear on the engine, turbine and propeller of the Cotton State was a common and recognized practice uniformly followed on all steam turbine driven ships and was known or should have been known to respondents

and to its agents and employees, the master and deckhands on the tug Lea Moe, as they brought the tandem tow of scows #25 and #15 alongside the starboard-offshore side of the Cotton State.

(4) That scows #15 and #25 did not carry navigation lights as required by applicable statutes or rules, although it was after sunset and dark at the time the scows were being moved by the tug Lea Moe.

(5) That scows #25 and #15 were in, and remained in, the control of respondents throughout the towing, landing and mooring operations and up to and after the time of the accident causing damages to the vessel and to scow #15. That no one employed by libelant or the Cotton State or representing them undertook to control or exercise any supervision over the manner and/or location of landing and securing the two scows alongside the vessel, or of the manner in which the tug was towing, or had coupled and secured, the two scows for the purposes of the tow.

(6) That there was ample maneuvering space in the slip at the south side of Port Dock #1 within which respondents could have safely maneuvered the tow, if properly handled.

(7) That respondents were negligent in the operation of the tug Lea Moe and of scows #25 and #15 as follows:

(a) In failing to observe the propeller and

stern section of the Cotton State and avoid contact with the propeller by scow #15;

(b) In failing to observe the propeller warning boards and flashing lights displayed over each side of the stern of the Cotton State;

(c) In maneuvering the tug and tow in such a manner as to permit scow #15 to come in contact with the stern section and slowly turning propeller of the Cotton State;

(d) In failing to have adequate crew aboard the tug and scows to enable those representing respondents during said operations to make adequate observations and obtain reports concerning the position of the scows with relation to the stern of the Cotton State and this take steps to avoid having scow #15 come in contact with the stern section and propeller of said vessel;

(e) In failing to allow for the set of the tide and current, thus permitting scow #15 to drift under the stern counter of the Cotton State and come in contact with its slowly turning propeller;

(f) In failing to display proper lights or any lights whatsoever, aboard scows #25 and #15 while being towed in navigable waters of the United States after the hour of sunset, as required by applicable statutes and rules;

(8) That the negligence of respondents was the sole, proximate cause of the accident of January 10, 1957, which caused damages to the SS Cotton State and to libellant.

(9) That libelant should recover from respondents and each of them its full damages in the agreed amount of \$22,500.

(10) That cross-libelant should recover nothing from libelant on their claim for damages to scow #15 and incidental expenses in connection therewith.

IV.

Pacific Tow Boat Company's Contentions

1. That the landing and changing of the scows was done pursuant to instructions from those on the Cotton State who were positioned on her deck and who had the best possible view of what was going on.

2. That the dispatching of the scows was pursuant to orders received for those acting for the Cotton State.

3. That there were no lights or warnings visible on the starboard side aft on the Cotton State when the Lea Moe passed that area with the scows.

4. That the Cotton State's jacking gear was started up, when the scows were alongside, by her engineers without any assurance from those on deck that the propeller area was cleared or that there was no potential danger to the propeller if it was rotated.

5. That those in charge of the Cotton State started up the propeller without warning to the tug.

6. That those on deck of the Cotton State had control of the scows, which were an integral unit, when the line from the No. 25 was secured on it and snugged on the steamer. Thereafter the scows were allowed to drift onto the propeller because of the failure of those on the Cotton State to hold them.

7. That the propeller of the Cotton State kept rotating for at least three to four minutes causing damage to three of its four blades. That situation was one which the mate or others on the steamer saw or should have seen and who negligently failed to see that the propeller's rotation was stopped at once to avoid or minimize damage to it and to the scow No. 15.

8. That the tying up of the scows was fully participated in and directed by the mate and those on deck of the Cotton State which vessel was the consignee of the scows.

9. That the conduct of those on the Cotton State was casual and without thought of the safety of that vessel or the scows when they started up the propeller, tied up the scows, and observed, or should have observed, the trouble of the No. 15.

10. That before starting up the jacking gear an inspection by someone should have been made that the propeller was not menaced. That was not done. Any such custom, to the contrary, was not known to the engineers and others on the Cotton State.

11. That there was an insufficient crew on deck of the Cotton State to tie up the scows.

12. That the mate's actions in getting his flashlight when he first saw the scow in the way of the propeller instead of notifying those in the engine room to stop its rotation, or controlling the scows with the line to the No. 25, or notifying those on the tug of the danger, was a lack of general prudence and good seamanship.

13. That whether or not there were lights on the scows had nothing to do with this matter because the scows were plainly visible to those on the deck of the Cotton State who actually had control over them when this occurred.

14. That the libel against Pacific Tow Boat Company and the tug Lea Moe should be dismissed with prejudice.

Eclipse Lumber Co.'s Contentions

1. That no one for whom it was or is responsible had anything to do with the way the scows were tied up or the damages occurred.

2. That it adopts the contentions of Pacific Tow Boat regarding the faults and neglect of those on the Cotton State.

3. That it should recover damages in the amount of \$9,789.12 as stipulated from States Marine Corporation of Delaware.

4. That the libel against it and the No. 15 should be dismissed with prejudice.

V.

Libelant's Contended Issues of Fact

1. What were the conditions at the stern of the Cotton State as to the propeller turning, and as to warning boards and lights as the tug Lea Moe and scows No. 25 and No. 15 approached and passed the stern of the vessel to enter the slip and come alongside the offshore-starboard side of the Cotton State?

2. Should the master and deckhands on the tug Lea Moe have observed the turning propeller, and the warning boards and lights, if any, at the stern of the Cotton State?

3. Who designated where the two scows were to be tied up or moored alongside the Cotton State?

4. Did the tug Lea Moe and scows No. 25 and No. 15 have an adequate number of persons aboard to control the tug and scows and to provide observations and reports on position and control during the maneuver being undertaken?

5. Did scows No. 25 and No. 15 have proper lights displayed on them during the operation and the maneuvers being performed at the time of the accident?

6. Did the master and deckhands of the Lea Moe fail to take proper steps to allow for the set

of the tide or current so as to prevent contact between the scow No. 15 and the stern and propeller of the Cotton State?

7. Was it negligent for the master and deckhands on the tug Lea Moe to allow its scow No. 15 to come in contact with the propeller and stern of the Cotton State?

8. Were the engineers of the Cotton State negligent in engaging the jacking or turning gear, or in failing to disengage or stop the turning gear before the accident?

Respondents Contended Issues of Fact

1. Did those on the deck of the Cotton State snug the line that they had passed to the No. 25 and was secured on the scow before the tug took in its line?

2. When was the propeller of the Cotton State started up and where were the scows then?

3. Did those on the Cotton State fail to hold the scows from drifting back or sagging under her counter after the line was passed and secured to the forward scow?

4. How long was the propeller in contact with the No. 15 and what, if anything, was done on the Cotton State during that period to avoid or minimize damage?

5. Was any inspection made by those on the Cotton State to see that the propeller area was clear before they started up the jacking gear?

6. Did anyone employed by Eclipse Lumber Co. participate in the events of this accident?

7. What was the participation of the officers and crew of the Cotton State in receiving and tying up the scows?

8. What did the chief mate of the Cotton State do, if anything, when he knew, or should have known, that the propeller of his ship was menaced?

9. What means were available to those on deck to notify the engineers that the propeller was menaced, and what if anything was done to give notification?

10. Was an efficient and seamanlike watch maintained in Cotton State's engine room and on her deck when the scows were brought along side and the jacking gear was engaged?

VI.

Libelant's Contended Issues of Law

1. Is there a presumption in favor of libelant and against respondents by reason of the moving tug and barges having come in contact with a stationary vessel?

2. Were the respondents or any of them negligent?

3. Was libelant negligent?

4. Was there statutory fault of respondents by reason of the failure, if any, to display proper

navigation lights on scows No. 15 and No. 25 under applicable statutes and rules?

5. Was the negligence, if any, of respondents or any of them, or of libelant, a proximate cause of the accident?

6. Should libelant recover the full amount of its damages from respondents, or any of them?

7. Should cross-libelants recover any of their damages against libelant?

8. Should the mutual fault doctrine be applied?

9. Should the major-minor fault doctrine be applied?

Respondents' Contended Issues at Law

1. Was libelant and cross-respondent negligent?

2. Were the respondents, or either of them, negligent?

3. Was the negligence, if any, of the respondents, or any of them, or of libelant and cross-respondent, the proximate cause of the accident?

4. What care of the scows was required by the Cotton State as their consignee?

5. Were those on the Cotton State negligent in failing to minimize the damages to the steamer and the scow?

6. Did those on the Cotton State exercise reason-

able diligence for the protection and the safety of the scows and the steamer?

7. Should the mutual fault doctrine be applied?

8. Should the libelant recover the full amount of its damages from respondents, or any of them?

9. Should the cross-libelant recover the full amount of its damages from the libelant and cross-respondent?

VII.

EXHIBITS

Libelants

Cotton State Deck Log-Rough—Resp. No. 3.

Cotton State Deck Log-Smooth.

Cotton State—Photostat of Bridge Bell Book—

Resp. No. 4:

Cotton State Engine Log-Rough—Boltz No. 1.

Cotton State Engine Log-Smooth—Boltz No. 2.

Cotton State Engine Bell Book—Boltz No. 3—

Resp. No. 2.

Photograph of Propeller—Boltz No. 4.

Photograph of Propeller—Boltz No. 5.

Photograph of Propeller—Boltz No. 6.

Photograph of Propeller—Boltz No. 7.

Photograph of Propeller—Boltz No. 8.

Photograph of Propeller—Boltz No. 9.

Photograph of Propeller—Boltz No. 10.

Certified photostat of the daily report for January 10, 1957, U. S. Weather Bureau, Seattle station.

Respondents

Log of tug Lea Moe.

Photograph of damage to scow E-15.

Photograph of damage to scow E-15.

Capacity plan of the C 2 type vessel.

The exhibits of all parties listed above were produced and identified and may be received in evidence if otherwise admissible without further authentication, it being admitted that each is what it purports to be. Exhibits not listed will be admitted by the court where a good cause is shown for the withholding or delay in presentation thereof.

VIII.

Action by Court

The foregoing pretrial order has been approved by the parties hereto as evidenced by the signatures of their counsel hereon. This order is hereby entered, and as a result of which the pleadings pass out of the case and this pretrial order shall not be amended except by order of the court pursuant to agreement of the parties or to prevent manifest injustice.

Done in open court this 21st day of November, 1958.

/s/ JOHN C. BOWEN,

United States District Judge.

Approved:

/s/ CHARLES B. HOWARD,
Of Attorneys for Libelant.

/s/ B. BAYARD CRUTCHER,
Of Attorneys for Respondents-Claimants and Cross-
Libelant.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 21, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action in Admiralty having been duly called for trial commencing on November 25 and the trial continuing on November 26, November 28 and December 1, 1958, upon issues of liability as set forth in Pretrial Order entered in this cause on November 21, 1958, the amount of provable damages on the libel and cross-libel having been agreed upon by the parties and admitted in the Pretrial Order; each of the parties being present and represented by their respective proctors of record, Summers, Bucey & Howard (Charles B. Howard and T. F. Paul of counsel) for libelant States Marine Corporation of Delaware and Bogle, Bogle & Gates (E. C. Biele and M. B. Crutcher of counsel, for respondents and claimants, the M/V Lea Moe,

Barge E-15, The Pacific Tow Boat Company, E. W. Stuchell, et al., co-partners doing business as Eclipse Lumber Co., the last named parties also being cross-libelants; the trial having proceeded with witnesses being called and evidence introduced by the libelant, respondents, claimants and cross-libelants; the Court having fully considered all of the evidence, the exhibits and the arguments of proctors for each party, and being otherwise fully advised in the premises, and having rendered its oral decision on December 1 at the conclusion of the trial; now therefore, in conformity with the Admitted Facts of the Pretrial Order and the oral decision of this Court, now makes and enters the following:

Findings of Fact

1. Libelant, States Marine Corporation of Delaware is a Delaware corporation and at all times material was the owner of the SS Cotton State, a merchant vessel of 6103 gross tons and 3315 net tons, registered length 438.9 feet and breadth 63.1 feet.

2. Respondent and claimant The Pacific Tow Boat Company is a Washington corporation with its principal office and place of business at Everett, Washington, and at all times material was the owner and operator of the respondent tug Lea Moe, a diesel powered vessel of 265 H.P., of 42 gross and 28 net tons, and of registered length 60.9 feet and breadth 18.8 feet, equipped with pilot house controls of the main engine.

3. Respondents, claimants and cross-libelants E. W. Stuchell, et al., doing business as co-partners under the assumed name of Eclipse Lumber Co. were at all times material residents of Snohomish or King Counties, State of Washington, and were the owners of the two square-ended cargo barges known as Eclipse No. 15 and Eclipse No. 25 (hereinafter referred to as No. 15 and No. 25), each of which was of wood construction, length 110.4 feet and breadth 37.9 feet.

4. That at the time of the filing of this action and of the service of process of this court in rem and in personam the tug Lea Moe and the barges No. 15 and No. 25 were within the geographical jurisdiction of this Court, to wit: at Everett, Washington.

5. That the Port Dock No. 1 of Everett is a public terminal in the harbor of Everett, Washington, on tidewater and not in the Snohomish River, within the geographical jurisdiction of this Court.

6. That on January 10, 1957, at about 6:45 p.m., the SS Cotton State completed its docking operations at the Port Dock No. 1 at Everett and was moored to the south side of said dock by lines extending from the fore and aft parts of the vessel to the dock. Said vessel had just arrived at Everett under its own power from Seattle, Washington. It was moored bow in and stern out, with its port side against the south side of Port Dock No. 1. That after the docking operations were completed

said vessel lay completely moored and stationary at that pier.

7. That at the aforesaid time, to wit: 6:45 p.m., the SS Cotton State had displayed on its offshore stern area a standard size fixed signboard type of warning of the propeller area and the danger to other craft of getting near that propeller area and particularly the propeller on that vessel. In addition thereto, there was in place overhanging the side of the ship at or about the stern quarter on the starboard or offshore side the usual warning light attached to a striped painted board which had been lowered to a point where it was suspended by rope lines a few feet above the level of the water. Said light was red in color and was burning and flashing every few seconds at all times material to this accident.

8. That immediately after the "Finished With Engine" bell was received in the engine room at 6:45 p.m., the engineer on watch, as was customary, started the turning engine or jacking gear on the SS Cotton State for the purpose of after-voyage conditioning of the vessel's engine, turbine and rotors, for their proper and usual care and protection during the period that the SS Cotton State would be alongside the Port Dock No. 1 for loading operations. The setting in motion and operation of said turning engine or jacking gear caused the propeller of the SS Cotton State to make a very slow turn, a full revolution taking a period of from seven

to eight minutes, which was in keeping with the customs and usages on turbine engine vessels of this type.

9. That on the evening of January 10, 1957, the tug Lea Moe shifted barges No. 15 and No. 25, loaded with lumber, from a mooring in Everett harbor to the offshore starboard side of the SS Cotton State. Said shift was made by the tug Lea Moe towing the barges in tandem on a short hawser extending for a distance of from 8 to 10 feet over the stern of the tug to where said hawser was attached to one stanchion at the forward starboard corner of barge No. 25. There were short coupling lines fastened between the two corner stanchions aft on the No. 25 to the two corresponding forward corner stanchions on the No. 15, which was the after barge in the tandem tow. The barges were thus close coupled, with a foot or two of clearance between them.

10. That during the aforesaid shift of the barges No. 15 and No. 25 the tug Lea Moe was manned by a master and two deckhands. Neither barge No. 15 or barge No. 25 carried a crew or bargemen. There were no employees of respondent Eclipse Lumber Co. aboard the tug or barges.

11. That during the aforesaid shift of the barges No. 15 and No. 25 the weather was fair, a light southeasterly wind was blowing, and the stage of the tide was approximately low water. Visibility was good but it was after sunset, which was at 4:29 p.m. and it was dark. The tug Lea Moe was burning

red and green side lights and towing lights on the mast. There were no lights or lanterns being carried or burned and displayed on either barge No. 15 or barge No. 25.

12. That while the SS Cotton State was lying at rest and completely moored at Port Dock No. 1, and within about five or six minutes after the vessel had thus become completely and properly moored, the tug Lea Moe came alongside the offshore or starboard side of the vessel, towing the two lumber laden barges, with No. 25 as the leading barge and No. 15 as the following or trailing barge. That as the tug and barges passed by the stern area and propeller area of the SS Cotton State, those persons on the tug were making preparations for tying up the two barges alongside the SS Cotton State to enable the lumber on the two barges to be loaded aboard the vessel. The master of the tug Lea Moe brought the tow alongside the SS Cotton State at a point considered by him to be a suitable place to stop the forward movement of the tug and tow and signalled to the chief mate on the deck of the SS Cotton State that the tug and tow desired a mooring line from the vessel. At that time the tug and tow had arrived at a point where the barge No. 25 was approximately under the midship house of the vessel.

13. The chief mate and the boatswain of the SS Cotton State passed a barge mooring line down to one of the deckhands of the tug who was then on the deck of barge No. 25, and who then attached said line to the offshore forward stanchion of No. 25,

the leading barge. The selection or determination of the place for fixing the line was determined by those aboard the tug and tow. No other mooring lines were secured between the SS Cotton State and either barge No. 25 or barge No. 15 before the accident occurred, the one mooring line being all that persons on the tug and barges called for.

14. That after the attaching of said single barge mooring line, the towing hawser of the tug was cast loose and the rear or trailing barge No. 15 was allowed by the tug Lea Moe to drift under the stern counter and to collide with the slowly revolving propeller of the SS Cotton State, with at least two or more blades of the propeller separately striking the after inshore or port side of barge No. 15. This resulted in severe and extensive damage to that barge and the tug Lea Moe thereupon towed it from under the stern of the vessel and to a place of comparative safety to prevent it from sinking.

15. That as a result of the propeller striking barge No. 15, the automatic cutoff device on the turning engine or jacking gear functioned to stop the revolving of the shaft and propeller of the SS Cotton State. There is not sufficient evidence to support a finding as to the exact time that the slow revolving of the propeller was stopped by reason of the functioning of the cutoff device on the turning engine or jacking gear.

16. That the respondent tug Lea Moe and the respondent and claimant Pacific Tow Boat Company

as its owner and operator were at fault and negligent in causing and contributing to cause the collision of the barge No. 15 with the propeller of the SS Cotton State in the following particulars:

(a) That the tug Lea Moe and its tow, being the moving vessels, collided with the slowly revolving propeller of the moored and stationary SS Cotton State.

(b) That the tug Lea Moe and respondent Pacific Tow Boat Company were negligent in failing to place and assist in placing, and seeing that there was placed upon the after end of barge No. 15, a navigation light, as required, under conditions then existing, by applicable law and regulations.

(c) That the tug Lea Moe and respondent The Pacific Tow Boat Company were negligent for not having a lookout posted on the after end of barge No. 15.

That the foregoing acts and omissions to act on the part of the tug Lea Moe and respondent The Pacific Tow Boat Company did proximately cause and proximately contribute to causing the collision of the barge No. 15 with the propeller of the SS Cotton State.

17. That respondent barge Eclipse No. 15 was at fault and negligent in not having navigation lights displayed and burning on the after end of said barge No. 15 during periods of navigation between the hours of sunset and sunrise, as required by ap-

plicable law and regulations. That the evidence in this case does not show that the absence of such navigation lights on barge No. 15 neither did not nor could not have been a proximate cause of the accident and collision and the resulting injury and damage to the SS Cotton State and her propeller. That the faults of the No. 15 were occasioned by the primary negligence of the tug and its owner-operators.

18. That the SS Cotton State was in all respects a completely moored vessel at the time of the accident. That the operation of the turning engine or jacking gear on the SS Cotton State at the time in question was in harmony with due and ordinary care for the safety of that vessel. That the precautions taken to display propeller warning signs and lights was in harmony with due and ordinary care for the safety of other vessels lawfully and prudently using and navigating the waters about and near the SS Cotton State and the propeller area of that vessel. That the SS Cotton State was not negligent or contributorily negligent in any material respect on account of any act of omission or commission respecting the occurrence of the accident and the resultant damage to the vessel and to barge No. 15.

19. That the damages sustained by libelant and the SS Cotton State as a result of this accident are in the agreed and admitted amount of \$22,500, which include cost of drydocking and repairs, de-

tention and extra expenses and incidental expenses incurred and paid by libelant.

20. That the admitted and agreed amount of damages to cross-libelant Eclipse Lumber Co., as a result of this accident are in the amount of \$9,-789.25, which includes cost of repairs, extra towage and extra charges for recovering and reloading lumber lost from the barge, rental of additional barge, extra labor and detention of stevedores, survey fee and other incidental charges.

Done in Open Court this 10th day of December, 1958.

/s/ JOHN C. BOWEN,
United States District Judge.

Conclusions of Law

Based upon the foregoing Findings of Fact it is concluded:

(1) This Court has jurisdiction of this cause and of the respondent vessels in rem and the respondent persons and corporation in personam.

(2) The SS Cotton State and libelant were not at fault and did not contribute to cause the accident.

(3) The respondent tug Lea Moe and its owner and operator, the respondent and claimant The Pacific Tow Boat Company were jointly and severally negligent and at fault and did each proximately contribute to cause the accident.

(4) The respondent barge Eclipse No. 15 was jointly and severally negligent and at fault with the respondent tug Lea Moe and respondent The Pacific Tow Boat Company and such fault did proximately contribute to cause the accident.

(5) That libelant is entitled to a decree against each of the above-named respondents and claimant The Pacific Tow Boat Company, jointly and severally, for the full amount of libelant's damages proximately resulting from the collision and accident in the sum of \$22,500, and libelant is additionally entitled to recover from each of the aforesaid respondents, jointly and severally, its taxable costs and taxable proctor's fee in this action.

(6) That cross-libelants are not entitled to recover from libelant in any amount on the cross-libel and said cross-libel should be dismissed with prejudice as to the libelant.

(7) That since the respondent The Pacific Tow Boat Company had the obligation to furnish a crew and navigation lights for the barge No. 15 and failed to do so, the cross-libelants E. W. Stuchell, et al., doing business as Eclipse Lumber Co. is entitled to a decree against the respondent The Pacific Tow Boat Company for the full amount of their damages proximately resulting from the collision and accident in the sum of \$9,789.25, and in addition thereto respondents Eclipse Lumber Co. as owners of the E-15 are entitled to recover from the owner-operators for any and all amounts for which they

may be liable to pay, and pay, to libelant herein respecting the Cotton State's damages.

Done in Open Court this 10th day of December, 1958.

/s/ JOHN C. BOWEN,
United States District Judge.

Prepared, approved and presented by:

SUMMERS, BUCEY &
HOWARD,

/s/ CHARLES B. HOWARD,
Proctors for Libelant.

Approved as to form only.

BOGLE, BOGLE & GATES,

By /s/ E. C. BIELE,

/s/ M. B. CRUTCHER.

Receipt of Copy acknowledged.

Lodged December 8, 1958.

[Endorsed]: Filed December 10, 1958.

United States District Court, Western District
of Washington, Northern Division

In Admiralty—No. 16271

STATES MARINE CORPORATION OF DELA-
WARE, a Corporation,

Libelant,

vs.

Motor Vessel LEA MOE, Official Number 241972,
Her Engines, Tackle, Apparel and Furniture,
and Barge E-15, Her Fittings and Equipment,

Respondents,

and

THE PACIFIC TOW BOAT COMPANY, a Cor-
poration, and E. W. STUCHELL, WILLIAM
D. CARPENTER, HARRY W. STUCHELL,
JR., M. A. WYMAN, D. E. WYMAN and
M. H. WYMAN, Co-partners, Doing Business
as ECLIPSE LUMBER CO.,

Respondents-Claimants.

E. W. STUCHELL, WILL D. CARPENTER,
HARRY W. STUCHELL, JR., M. A.
WYMAN, D. E. WYMAN and M. H. WYMAN,
Co-partners, Doing Business as ECLIPSE
LUMBER CO.,

Cross-Libelants,

vs.

STATES MARINE CORPORATION OF DELA-
WARE, a Corporation,

Cross-Respondent.

FINAL DECREE

This action in Admiralty having come on duly
and regularly for trial on November 25, 1958, and

subsequent days, each party being present and represented by their respective proctors of record, Summers, Bucey & Howard (Charles B. Howard and T. F. Paul of counsel) for libelant and Bogle, Bogle & Gates (E. C. Biele and M. B. Crutcher of counsel) for all respondents and claimants and the cross-libelants, the trial having proceeded and witnesses having been called and evidence produced on behalf of the libelant, the respondents, claimants and cross-libelants, the Court having considered all of the evidence, the exhibits, the trial briefs and supplements, and the arguments of proctors for each party, and being otherwise fully advised in the premises, and the Court having heretofore rendered its oral decision at the conclusion of the trial on December 1, 1958, and having entered its Findings of Fact and its Conclusions of Law in conformity with said oral decision, now therefore, it is hereby:

Ordered, Adjudged and Decreed:

1. That libelant States Marine Corporation of Delaware, a corporation, have and recover in this cause from the respondent tug Lea Moe, and the respondent barge Eclipse #15 in rem and the principals upon the respective release and cost bonds filed herein by the claimants of the tug Lea Moe and barge Eclipse #15, and the respondents The Pacific Tow Boat Company, a corporation, in personam, jointly and severally, its full damages in the sum of \$22,500, plus libelant's taxable costs and taxable proctor's fee in the total amount of \$233.90.

2. That as between the claimant of the said respondent tug¹ *Lea Moe* and the claimants of the said respondent barge *Eclipse No. 15*, the aforesaid total amount of damages, costs so adjudged to the libelant shall be paid by the said claimants respectively and their sureties on the release and cost bonds in equal parts, that is to say, one-half of said sum by the claimant of the said tug *Lea Moe* or its sureties and one-half thereof by the claimants of the barge *Eclipse No. 15* or its sureties; and that any balance of either of said halves which the libelant may not be able to collect from or enforce against either of said vessels, or their respective claimants and sureties, be paid by the other vessel, her claimant or sureties, and that the said vessels be condemned therefor.

3. That unless this decree be satisfied within ten (10) days after service of a copy of this decree with notice of its entry upon proctors for each of the claimants and representatives of the surety upon each of the release and cost bonds filed upon behalf of the respective claimants, the clerk of this court without further notice shall enter summary judgment against each of said sureties, on the respective release and cost bonds for the tug *Lea Moe* and barge *Eclipse No. 15*, after which execution may issue forthwith if this decree shall not have been satisfied or superseded.

4. That respondents and cross libelants *E. W. Stuchell, et al.*, doing business as *Eclipse Lumber Co.*, have and recover judgment against the respondent *The Pacific Tow Boat Company*, a corporation, its full damages in the sum of \$9,789.25,

plus any and all amounts for which they may be liable to pay, and pay, to libelant herëin respecting the Cotton State's damages.

5. That the cross-libel and all claims of cross-libelants E. W. Stuchell, et al., against the libelant States Marine Corporation of Delaware, a corporation, be and the same is dismissed with prejudice and said cross-libelants shall recover nothing from said libelant.

6. That the Stipulation for Costs as filed herein by the libelant be, and the same is hereby exonerated, and the principal and the surety thereon discharged from any and all liability with respect thereto.

Done in Open Court this 10th day of December, 1958.

/s/ JOHN C. BOWEN,

United States District Judge.

Prepared, approved and presented by:

SUMMERS, BUCEY &
HOWARD,

/s/ CHARLES B. HOWARD,

Proctors for Libelant.

Approved as to form only.

BOGLE, BOGLE & GATES,

By /s/ E. C. BIELE,

/s/ M. B. CRUTCHER.

Receipt of copy acknowledged.

Lodged December 8, 1958.

[Endorsed]: Filed December 10, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that The Pacific Tow Boat Company, respondent-claimant, and E. W. Stuchell, William D. Carpenter, Harry W. Stuchell, Jr., M. A. Wyman, D. E. Wyman and M. H. Wyman, co-partners doing business as Eclipse Lumber Co., respondents-claimants and cross-libelants, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final decree entered in this action on December 10, 1958.

Dated at Seattle, Washington this 18th day of December, 1958.

BOGLE, BOGLE & GATES,

/s/ CLAUDE E. WAKEFIELD,

/s/ EDWARD C. BIELE,

Proctors for the Pacific Tow Boat Company and
E. W. Stuchell, et al., d/b/a Eclipse Lumber Co.

[Endorsed]: Filed December 18, 1958.

[Title of District Court and Cause.]

ORDER FIXING SECURITY

This cause having come on to be heard on the motion of The Pacific Tow Boat Company, respondent-claimant, and E. W. Stuchell, William D. Carpenter, Harry W. Stuchell, Jr., M. A. Wyman, D. E. Wyman and M. H. Wyman, co-partners doing business as Eclipse Lumber Co., respondents-

claimants and cross-libelants, for stay pending their appeal to the United States Court of Appeals for the Ninth Circuit, and it appearing that appellants filed a timely notice of appeal; and it appearing that release and cost bonds in the amounts of \$30,-500 conditioned to abide by and answer the final decree of any appellate court were given on behalf of the tug Lea Moe and the scow Eclipse No. 15 with appellants as principals and sufficient sureties thereon, and it appearing that appellants furnished a supersedeas bond in form, amount and surety approved by proctor for the libelant, and it appearing to the Court that such release and cost bonds, and supersedeas bond should be accepted for such security as required of appellants, now therefore, it is hereby

Ordered, Adjudged and Decreed that the execution of any proceedings to enforce the decree entered herein on December 10, 1958, be stayed pending determination of respondents'-claimants' and cross-libelants' appeal from said decree, and it is further

Ordered, Adjudged and Decreed that release and cost bonds filed on behalf of the Eclipse No. 15 and the tug Lea Moe and the supersedeas bond in the amount of ten thousand dollars (\$10,000) executed by the Fidelity and Deposit Company of Maryland be accepted and stand as security for any decree rendered by the United States Court of Appeals for the Ninth Circuit in favor of libelants and operate to supersede the execution of the judgment entered in this action pending the final disposition

of the respondents'-claimants' and cross-libelants' appeal to the said United States Court of Appeals for the Ninth Circuit.

Done in Open Court this 29th day of December, 1958.

/s/ JOHN C. BOWEN,
United States District Judge.

Approved and presented by:

/s/ EDWARD C. BIELE,
Of Bogle, Bogle & Gates, proctors for The Pacific
Tow Boat Company and E. W. Stuchell, et al.,
d/b/a Eclipse Lumber Co.

Approved as to form and content and notice of presentation and entry waived.

/s/ CHARLES B. HOWARD,
Of Summers, Bucey & Howard, Proctors for States
Marine Corporation of Delaware.

[Endorsed]: Filed December 29, 1958.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents:

That the Fidelity and Deposit Company of Maryland, a corporation, created, organized and existing under and by virtue of the laws of the State of Maryland, having its principal place of business in the City of Baltimore, State of Maryland, and duly authorized to carry on a general casualty insurance

business within the State of Washington, and in the courts of the United States, is held and firmly bound unto States Marine Corporation of Delaware, libelant, in the full and just sum of Ten Thousand Dollars (\$10,000.00), to be paid to the said States Marine Corporation of Delaware, its administrators, executors, successors, or assigns, to which payment, well and truly to be made, binds itself, its successors and assigns firmly by these presents.

Signed and Sealed this 29th day of December, 1958.

Whereas, on December 10, 1958, in an action pending in the United States District Court for the Western District of Washington, Northern Division, between States Marine Corporation of Delaware, as libelant, and The Pacific Tow Boat Company, respondent and claimant of the tug Lea Moe, and E. W. Stuchell, William D. Carpenter, Harry W. Stuchell, Jr., M. A. Wyman, D. E. Wyman and M. H. Wyman, co-partners doing business as Eclipse Lumber Co., respondents and claimants of the Scow Eclipse No. 15 and cross-libelants, Admiralty Cause No. 16271, a final decree was rendered in favor of the said libelant, States Marine Corporation of Delaware, and against The Pacific Tow Boat Company and E. W. Stuchell, William D. Carpenter, Harry W. Stuchell, Jr., M. A. Wyman, D. E. Wyman and M. H. Wyman, co-partners doing business as Eclipse Lumber Co., and the said respondents, claimants and cross-libelants, The Pacific Tow Boat Company and E. W. Stuchell, William D. Carpenter, Harry W. Stuchell, Jr., M. A.

Wyman, D. E. Wyman, and M. H. Wyman, co-partners doing business as Eclipse Lumber Co., having filed a Notice of Appeal from such decree to the United States Court of Appeals for the Ninth Circuit:

Now, Therefore, the condition of this obligation is such, that if the said respondents, claimants and cross-libelants shall prosecute their appeal to effect and shall satisfy the decree in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if such decree is affirmed, or shall satisfy in full such modification of the decree and such costs, interest and damages as the said Court of Appeals may adjudge an award, but not exceeding the amount of Five Thousand Dollars (\$5,000.00) as to The Pacific Tow Boat Company and Five Thousand Dollars (\$5,000.00) as to E. W. Stuchell, William D. Carpenter, Harry W. Stuchell, Jr., M. A. Wyman, D. E. Wyman and M. H. Wyman, co-partners doing business as Eclipse Lumber Co., then this obligation to be void: otherwise to remain in full force and effect.

[Seal]

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND.

By /s/ GUERTIN CARROLL.

Attorney in Fact.

Approved as to form, amount and surety.

/s/ CHARLES B. HOWARD.

Of Summers, Bucey & Howard, Proctors for States
Marine Corporation of Delaware.

/s/ EDWARD C. BIELE,
Proctor for Eclipse Lumber Co. and the Pacific
Tow Boat Company.

Approved in Open Court this 29th day of December, 1958.

/s/ JOHN C. BOWEN,
United States District Judge.

[Endorsed]: Filed December 29, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Appellants intend to rely on this appeal as follows:

1. The court erred in applying the presumption of fault against moving vessels under the circumstances of this matter when the integral and close-coupled scows Eclipse No. 15 and No. 25 were already attached to the Cotton State and controllable by her crew for some time before collision.
2. That the court erred in requiring a lookout or lights on the scow Eclipse No. 15 when the visibility was good, when those on the Cotton State by their own testimony could have seen what was going on, and the integral and close-coupled scows had been attached to the Cotton State for some time before collision.
3. That the court erred in not finding negligence

on the Cotton State when those on her failed to keep a lookout astern and without appreciation of danger or good seamanship started up and then allowed her propeller to rotate and to chew up the scow Eclipse No. 15 for 4 or 5 minutes thereby not avoiding or minimizing damages.

4. That the court erred in finding that after the integral and close-coupled scows were attached to the Cotton State the tug Lea Moe allowed the Eclipse No. 15 to drift into collision with the steamer's propeller.

5. That the court erred in imposing in rem liability on the scow Eclipse No. 15 which was a "dumb" vessel at all times under control of either the Cotton State or the tug Lea Moe.

6. That the court erred in dismissing the cross-libel of appellant E. W. Stuchell, et al., d/b/a Eclipse Lumber Co.

7. That the court erred in decreeing liability upon appellant, The Pacific Tow Boat Company, the tug Lea Moe and the scow Eclipse #15.

BOGLE, BOGLE & GATES.

By /s/ E. C. BIELE,

Proctors for Appellants, The Pacific Tow Boat Company and E. W. Stuchell, et al., d/b/a Eclipse Lumber Co.

Receipt of copy acknowledged.

[Endorsed]: Filed February 9, 1959.

In the District Court of the United States for the
Western District of Washington, Northern
Division

In Admiralty—No. 16271

STATES MARINE CORPORATION OF DELA-
WARE, a Corporation,

Libelant,

vs.

Motor Vessel LEA MOE, Official number 241972,
Her Engines, Tackle, Apparel and Furniture,
and Barge E-15, Her Fittings and Equipment,

Respondents,

and

THE PACIFIC TOW BOAT COMPANY, a
Corporation, and E. W. STUCHELL, WIL-
LIAM D. CARPENTER, HARRY W. STU-
CHELL, JR., M. A. WYMAN, D. E. WYMAN
and M. H. WYMAN, Co-partners Doing Busi-
ness as ECLIPSE LUMBER CO.,

Respondents-Claimants.

E. W. STUCHELL, WILL D. CARPENTER,
HARRY W. STUCHELL, JR., M. A. WY-
MAN, D. E. WYMAN and M. H. WYMAN,
Co-partners, Doing Business as ECLIPSE
LUMBER CO.,

Cross-Libelants,

vs.

STATES MARINE CORPORATION OF DELA-
WARE, a Corporation,

Cross-Respondent.

STATEMENT OF FACTS

Be It Remembered, that the above-entitled and numbered cause was heard before the Honorable John C. Bowen, a Judge of the above-entitled Court, beginning Tuesday, November 25, 1958, at 3:40 o'clock p.m.

The libelant-cross-respondent was represented by Mr. Charles B. Howard and Mr. Thomas F. Paul, of Messrs. Summers, Bucey & Howard, Attorneys at Law.

The respondents, respondents-claimants and cross-libelants were represented by Mr. Edward C. Biele and Mr. M. Bayard Crutcher, of Messrs. Bogle, Bogle & Gates, Attorneys at Law.

Whereupon, the following proceedings were had and done, to wit:

The Court: If Counsel are ready now to proceed I will hear so much of your opening statements as you are willing to give. Are any other Counsel interested in this matter?

Mr. Howard: Mr. Paul will be associated with me, your Honor, in the case.

Mr. Biele: Your Honor, Mr. Crutcher will be associated with me. He is in the office right now. [2*]

The Court: Then we will hear libelant's opening statement from the present station of Counsel if libelant is ready.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Mr. Howard: May it please the Court.

The Court: Mr. Howard.

Mr. Howard: And Counsel. In this case the States Marine Corporation of Delaware, the libellant, as the owner of a merchant vessel known as the Cotton State seeks to recover its damages sustained in an accident at Everett, Washington, on January 10, 1957, while that vessel, the Cotton State, was moored at the Port Dock at Everett for the purpose of loading cargo.

We expect the evidence in the case to show that at that time and during a period of darkness the tug Lea Moe, which is one of the respondent vessels, towing two barges designated as E-15 and E-25, which barges were loaded with lumber, were towed alongside or to a position alongside the off-shore side of the vessel at the dock and due to the manner in which those vessels were handled in the course of bringing them alongside the vessel by the tug the aftermost barge, being the E-15, was allowed to drift or sag down under the stern counter of the ship, contacting the propeller of the ship and causing damage to the propeller of the ship as well as to the barge and some lost lumber on [3] the barge.

We expect the evidence to show, if the Court please, that in accordance with the type of machinery that was used to propel the Cotton State and the customary practice with turbine driven ships of that kind, as soon as the ship had been docked at Everett, Washington, the engineer on watch placed the engine in what is known as turning gear

or jacking gear, which is an electrically driven mechanism in the engine room of the vessel which is used for the purpose of slowly turning the propeller and the shaft and the turbine of the main engine to insure that the machinery and particularly the part in the turbine will cool down uniformly and not cause any damage to the equipment; that as a result of that turning of the wheel when the barge was allowed to come in contact with the stern and the propeller of the vessel there was damage sustained to three of the four blades of the propeller of the Cotton State. The damage was subsequently repaired while the vessel was placed on dry dock at Seattle.

We have agreed between the parties, between Counsel, as to the full amount of the damages claimed by the libelant which is set forth in the pretrial order in the amount of \$22,500, and in turn we have agreed that the damage which is claimed on the cross-libel against [4] the States Marine Corporation sustained by the barge and as a result of the loss of cargo off the barge is in the amount of \$9,789.25.

We contend on behalf of the libelant that there were various faults involved by the respondents in the operation of the tug and barge.

Principally we expect to prove that at the time that this accident occurred the barges were still in the control of the tug, they had not completed the delivery of the barges to the vessel; that the operator of the tug, the master of the tug was the one that determined where and how the barges

were to be brought alongside the vessel and where they were to be tied up; that there was in fact only one line securing the leading barge to the vessel at the time the accident occurred and that there were no mooring lines whatsoever securing the aftermost barge in the tow to the vessel in any way. In other words, it was not attached to the vessel in any way. The two barges were coupled together and the only connection between the ship and the barges and the tug was one mooring line which had been passed to the leading barge, which was not the barge which was involved in the accident.

We also expect the evidence to show that at the time of this accident it was dark; that the tug [5] carried certain navigation lights but that there were no lights whatsoever burning on the barge or either one of the barges; that as a result of that failure to display the regulation type of lights on the barges after the period of sunset it was impossible for anyone on the deck of the ship to determine exactly what the length of the barge tow was or to ascertain whether there was danger of any contact between the stern of the vessel and the barge.

We expect the evidence to also show that the tug was manned by a master and two deck hands, that there were no other personnel available to serve on the barges during the course of this movement of the barges alongside the ship and that by reason of the inadequate number of personnel which were carried on the tug and barges they were not sufficient persons to advise the master of the tug

as to what the relative position of the barges was with respect to the stern of the vessel or to provide enough personnel to handle barge mooring lines that might be passed between the barge and the vessel.

We expect the evidence to show that what was done on the Cotton State was entirely proper procedure as far as the engine department is concerned; that the vessel was properly manned; that the operation of the [6] turning gear was a customary practice and in fact was known to the master of the tug; that there was no default or neglect of any kind insofar as the personnel on the deck of the ship are concerned; that there were adequate men available on the deck of the ship to handle barge mooring lines or to do any other work that was necessary in connection with the securing of the barges.

We contend that this is a case where the entire fault for the collision was that of the respondents and that there should be no division of the damages and that the libelant should recover in this case the full amount of its damages in the stipulated amount of \$22,500.

The Court: I will hear respondent's opening statement.

Mr. Biele: Thank you. May it please the Court, I represent Pacific Tow Boat Company, which owned and operated the tug Lea Moe. I also represent Eclipse Lumber Company, a partnership, which owned the scows Eclipse No. 15 and Eclipse No. 25.

Those two scows were loaded with lumber which was to be loaded aboard the libelant's steamer Cotton State. For the purpose of shifting the scows alongside the Cotton State the Eclipse Lumber Company employed the [7] tug Lea Moe and respondent Pacific Tow Boat Company.

There are two sides to this, or I should say the evidence upon which we rely will come from the witnesses of the libelant as well as from the witnesses produced on behalf of the respondents.

From the libelant's witnesses we expect the evidence will show that the visibility at this time was good and that there was no doubt as to what was going on at the time.

We expect to show that the chief officer of the Cotton State was on deck when the scows were brought alongside and that he was there to receive them; that the scows were brought alongside and as they approached on the tug, the two scows being close coupled and one aft of the other in tandem, someone on the Cotton State ordered the scows to be shifted or their positions changed from the manner in which they were being brought alongside; that to do this the captain of the tug Lea Moe spotted the scows directly where he was ordered to do so and that thereupon the mate of the Cotton State passed a line to the scows and that that line was secured by the deck hand on the tug over the same towing bitt which the tug had used to bring the scows alongside; that that line was then secured on the Cotton State and that before the tug took in its line it was assured that [8] the steamer

had the scows in tow, in charge and control; that thereupon the tug cast off and backed out and proceeded to take a position on the stern to pick up the trailing scow; that while they were doing that the propeller of the Cotton State was started up without warning to anyone; that as the propeller was started up the time at which it was started was exactly the time that the log of the Cotton State shows that the scows were brought alongside, 1840 hours, the propeller was started up and the Cotton State took the scows alongside; that when the propeller was started up there was no warning or assurance given to the engineers in the engine room of the Cotton State that the area was clear or that scows were alongside or that there was any reason to start the propeller up; that good seamanship and general prudence required that the stern area be checked; that in this case that was not done.

The evidence will further show from libelant's own witnesses, your Honor, that they started up this jacking gear, which turns the propeller over at a speed of seven to eight minutes per one turn or revolution, and that the propeller was in contact with the scow, Eclipse No. 15, for three to four minutes, and that during that time there were three blades of the propeller damaged and that the propeller was rotating in—as you [9] look at the stern of the vessel from the stern of the vessel it was rotating in a counter-clockwise direction, and that the propeller came up under the scow and

damaged it and hit it at least three times over a period of three to four minutes.

The Court: The scow?

Mr. Biele: The scow, your Honor. The propeller hit the scow at least three times because three blades of the propeller were damaged.

Now, during that three to four minute period the evidence will show that the chief mate on the Cotton State had a line on the scows. He did nothing to control the situation. In fact, he may have pulled the scows into the propeller. The only reaction that he did was to run to get a flashlight, although there was a flashlight available by one of the crew members that was right alongside of him; that in those three or four minutes he gave absolutely no warning to the tug; that in that time he could have stopped the propeller by merely calling up the enging room, a matter of a few seconds to throw out a switch in the engine room, and that the propeller would have been stopped and all or substantially all of the damage would have been averted.

We will also show, your Honor, that the manner in which the engineers on the Cotton State started up [10] the propeller was based upon a series of assumptions, none of which are good seamanship, and in the present case which were not carried out, and particularly that there was no check made of the stern area by anyone on deck to see that the stern of the Cotton State was free and clear of possible danger.

We will also show from the witnesses of the re-

spondents, your Honor, that there was no warning given whatsoever that the propeller was going to be started up.

We will also show the makeup of the scows, that they were an integral unit. That has been stipulated in the pretrial order, that they were tied close coupled with a foot or so clearance. That the manner in which the master brought the scows alongside was directed by those on the Cotton State; that the deck hand of the tug secured the line which was passed and substituted for the line of the tug. We will prove that the explanation for this was either that the mate failed to hold the scows or that he pulled them back aft, failing to keep in mind that the propeller was turning over. We will show that at the time the deck hand was on the scows and after the first line had been secured he heard a noise in the engine room which indicated that the propeller was being started up and that that was the time after the Cotton State had control of [11] these scows that the propeller without warning was started up.

We will also show that the tug was never in contact with these scows at any time after the Cotton State took control of the tow.

We will also show that there was no one from Eclipse Lumber Company, the other respondent, on the tug, on the steamer, the Cotton State, or on the scows or had anything whatsoever to do with this matter, and that in this case the Eclipse Lumber Company is a completely innocent party, had nothing whatsoever to do with the circumstances, and

that it should be awarded its damages in whole from the cross-respondent States Marine Corporation or alternatively, if there is a mutual fault, that the damages should be divided between the Cotton State, States Marine, Mr. Howard's clients, and The Pacific Tow Boat Company tug Lea Moe.

Thank you, your Honor.

The Court: Are there any depositions to be presented in this case by either litigant?

Mr. Howard: Yes, your Honor.

Mr. Biele: There are a number of them, your Honor.

The Court: Which would you prefer, to spend a half an hour or so or a little longer reading [12] depositions, or introducing live testimony?

Mr. Howard: I would like to read one deposition first, your Honor.

The Court: Personally I would like to get the depositions off as soon as possible. Were any depositions taken of rather salty language men who forget that it is going to be reported and indulge in profanity or some other obscene language that you know of?

Mr. Howard: I can't think of any instance.

Mr. Biele: I don't know of any, your Honor.

The Court: You may proceed.

Mr. Howard: I would like to offer the deposition of Mr. Judy.

The Court: J-u-d-y?

Mr. Howard: J-u-d-y.

The Clerk: M. Judy.

The Court: Whoever is a good speedy reader

as to each question and answer, I will be glad to assign the job to them, and let us proceed.

Mr. Howard: Would you like me to take the stand, your Honor?

The Court: I should think you might prefer to read the answers.

Mr. Howard: I would, your Honor. [13]

Mr. Biele: Mr. Paul is——

The Court: Mr. Paul, will you read the questions?

Mr. Howard: I don't have enough copies of the deposition to go around.

The Court: Mr. Paul, I would like you to read rather expeditiously. Do not dwell too long on the words, try to speed it up.

Mr. Paul: Shall I proceed now, your Honor?

The Court: Yes, and unless there is objection you may skip down to Page 3 where it says Direct Examination by Mr. Biele.

Mr. Howard: The Judy deposition starts on Page 55, your Honor.

The Court: Skip to Page 55. These pages, unfortunately, are not lined. Down to where the direct examination begins, please.

(Thereupon, the deposition of Maurice Judy was read as follows:)

DEPOSITION OF MAURICE JUDY

"Q. Mr. Judy, where do you live?

"A. 813 West 14th Street, Austin, Texas. That is my home address. That is my daughter's address.

"Q. What license do you have?

"A. Master's license.

"Q. How long have you had that license? [14]

"A. Well, I have had the master's license for about eleven years. This particular license I have had for a year now. You see, you have to get that renewed every five years.

"Q. How long have you been employed by States Marine Company? A. Since 1946.

"Q. How long have you been employed aboard the Cotton State?

"A. Well, I made one trip and then went on vacation, and then I just came back on this trip. I just had been back from vacation a couple of days when it was in Everett.

"Q. You had just returned from your vacation?

"A. Yes, about two days before, one or two days.

"Q. Where did you board? In Seattle?

"A. In Seattle, yes.

"Q. What were you employed as while the vessel was in Everett during January, 1957?

"A. In Everett?

"Q. Yes.

"A. When we was docking I was on the bridge.

"Q. What were you employed as? What was your position? A. Oh, fourth man.

"Q. Had you been other than fourth man on the ship before?

(Deposition of Maurice Judy.)

“A. I was third mate on the trip before when I went on vacation, third mate under Green. [15]

“Q. Were you watch officer when the vessel docked?

“A. I was on the bridge docking, yes. I wasn't exactly—the watches were broken, see. The chief mate, the second mate and myself was all on duty when we was docking.

“Q. What was your duty when the vessel docked?

“A. Handling the telegraph on the bridge.

“Q. Where do you do that from?

“A. On the bridge in the wheelhouse.

“Q. After the vessel finished docking did you remain on watch?

“A. No. As soon as I finished securing the bridge and writing up the log, then I was off watch.

“Q. What time did you finish writing up the log?

“A. Oh, I don't know. What time did we get the finished-with-engines? About 20 minutes, 20 or 25 minutes. I mean I can't say.

“Mr. Biele: Will you mark this as Respondent's Exhibit 3.”

Mr. Howard: May I have the brief case? It has the exhibits in it. It's by Mr. Paul there.

The Clerk: It will be Libelant's Exhibit No. 1.

(A rough deck log was marked Libelant's Exhibit No. 1 for identification.)

Mr. Howard: Shall I proceed, your Honor? [16]

(Deposition of Maurice Judy.)

The Court: You may.

(The reading of the deposition was continued as follows:)

“The Witness: Probably about 20 minutes, you know. I mean after you get the finished-with-engines, you pull the flags down and secure everything on the bridge and write up the log. Probably it is 20 minutes later. I believe the third mate was on watch after that from there in, if I am not mistaken.

“Q. You are referring to what has been marked as Exhibit No. 1. Do you recognize that?

“Mr. Howard: What is this book?

“A. It is the log book.

“Q. (By Mr. Biele): It is the log book?

“A. That is the rough log, the deck rough log book.

“Q. Did you make any entries in that book?

“A. Yes, I made entries in it. I made these entries here where my signature is.

“Q. What are you referring to?

“Mr. Howard: Do you want him to read those entries?

“Mr. Biele: Yes.

“Mr. Howard: Do you know when you started here?

“A. Well, I probably started here. This is when I came on.” [17]

Mr. Howard: He reads a quote then, your Honor, from the log book.

(Deposition of Maurice Judy.)

“ ‘1827 first line on dock forward; 1835 gangway down; 1935 finished with engines. All secure, port side to, Pier No. 1, South Everett, Washington. Pilot away. Propeller boards and lights over stern.’

“Q. Is that the last entry you made?

“A. That is the last entry I made, yes.

“Q. What time of the day did you make that entry?

“A. Well, 1835, and then I wrote, you know, this stuff up. You see, you put this in the bell book after you get docked. You don't have time to write it—you take it from the bell book after you dock, and then you write all this up in the log here, all this stuff that you write as you go along.

“Mr. Biele: Will you mark this Respondent's Exhibit 4.”

Mr. Howard: Your Honor, that's the photostat that's in the original bell book.

The Court: Do you wish it marked?

Mr. Howard: Yes, your Honor. It's in there. I suggest we take all of those out now.

The Court: Does Mr. Biele have an interest in keeping in his own mind identified these respective exhibits that are being now detached from this group of [18] depositions?

Mr. Biele: No, your Honor, it's perfectly acceptable.

The Court: You have in mind a clear picture

(Deposition of Maurice Judy.)

of which ones are being removed and which ones are there, do you not?

Mr. Biele: Yes, your Honor.

The Court: The manual job of getting them in and out calls for separating them now so they will be available for quicker reference.

Mr. Howard: Mr. Bruff has the one to be identified marked at this time, your Honor.

The Court: It will now be marked.

The Clerk: Libelant's Exhibit 2.

(Photostatic copy of page of deck bell book was marked Libelant's Exhibit No. 2 for identification.)

The Court: Libelant's Exhibit 2 has now been marked. It purports to be a photostat of a page of something.

(The reading of the deposition was continued as follows:)

“Q. (By Mr. Biele): The reporter has handed you what he has marked as Libelant's Exhibit 2. Do you recognize that?

“A. This is the bell book. That is the deck bell book. [19]

“Q. Is that a record of the ship?

“A. Yes; it is a record of the bells, and so on, that we give up on the bridge.

“Q. Did you make any entries in that?

“A. I made these entries.

“Q. What entries are you referring to?”

(Deposition of Maurice Judy.)

The Court: Mr. Biele, I think you must be mixed up already on the identification of the exhibits. The first main thing, the big book, is the deck log and that is No. 1.

Mr. Biele: That's No. 1, yes, your Honor.

The Court: No. 2 is a page out of something, a photostat of a page out of something. Let him see it. That is No. 2. That is not what you have been referring to in your language.

Mr. Biele: Your Honor, I think that was Exhibit 4 in the deposition but it's now Exhibit 2 in the trial.

The Court: Very well, let it be so understood then. Is that agreeable to you? Do you think that is proper?

Mr. Howard: Yes, your Honor.

The Court: Very well. Then the reporter's notes are correct as to the figure reference. I wish I knew what you are going to call it. Does anyone know [20] what it may be called? This No. 2 is merely one page.

Mr. Howard: It is described by the witness, your Honor, as a deck bell book. It's a photostat page out of the deck bell book.

The Court: You may proceed.

Mr. Howard: Is that the top of the next page?

Mr. Biele: Yes.

(The reading of the deposition was continued as follows:)

"A. 1-10-57, Everett, Washington.

(Deposition of Maurice Judy.)

of which ones are being removed and which ones are there, do you not?

Mr. Biele: Yes, your Honor.

The Court: The manual job of getting them in and out calls for separating them now so they will be available for quicker reference.

Mr. Howard: Mr. Bruff has the one to be identified marked at this time, your Honor.

The Court: It will now be marked.

The Clerk: Libelant's Exhibit 2.

(Photostatic copy of page of deck bell book was marked Libelant's Exhibit No. 2 for identification.)

The Court: Libelant's Exhibit 2 has now been marked. It purports to be a photostat of a page of something.

(The reading of the deposition was continued as follows:)

"Q. (By Mr. Biele): The reporter has handed you what he has marked as Libelant's Exhibit 2. Do you recognize that?

"A: This is the bell book. That is the deck bell book. [19]

"Q. Is that a record of the ship?

"A. Yes; it is a record of the bells, and so on, that we give up on the bridge.

"Q. Did you make any entries in that?

"A. I made these entries.

"Q. What entries are you referring to?"

(Deposition of Maurice Judy.)

The Court: Mr. Biele, I think you must be mixed up already on the identification of the exhibits. The first main thing, the big book, is the deck log and that is No. 1.

Mr. Biele: That's No. 1, yes, your Honor.

The Court: No. 2 is a page out of something, a photostat of a page out of something. Let him see it. That is No. 2. That is not what you have been referring to in your language.

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Mr. Howard: Yes, your Honor.

The Court: Very well. Then the reporter's notes are correct as to the figure reference. I wish I knew what you are going to call it. Does anyone know [20] what it may be called? This No. 2 is merely one page.

Mr. Howard: It is described by the witness, your Honor, as a deck bell book. It's a photostat page out of the deck bell book.

The Court: You may proceed.

Mr. Howard: Is that the top of the next page?

Mr. Biele: Yes.

(The reading of the deposition was continued as follows:)

"A. 1-10-57, Everett, Washington.

(Deposition of Maurice Judy.)

“Mr. Howard: Did you make all the entries on that page?

“A. I made these entries.

“Mr. Howard: The first entry is 1813½.

“A. Dead slow ahead.

“Mr. Biele: Let’s stick to that page.

“A. Yes; I made all those entries.

“Q. You made all the entries on the left-hand page?

“A. That is right, on the left-hand page for that 1-10.

“Q. When did you make those entries?

“A. Well, I made those at the time that is on there, because this is the one we work with. As they ring the telegraph you put those down. This is temporary. At the time you make the entry is the time you make it.

“Q. Was the last event during the docking procedure finished-with-engines? [21]

“A. 1835, finished with engines; all secure, port side to, Pier 1, South Everett, Washington. Then I take this and I write the rough log.

“Q. You write the rough log?

“A. You don’t have time to do that as you go along. You have to do this—you write this at the end of the watch.

“Q. Upon completion of your writing of the rough log your duties were finished?

“A. Yes; after I take the flags down and secure the bridge, you know, everything on the bridge

(Deposition of Maurice Judy.)

—see that everything is secured, the binoculars and everything put away, and so forth.

“Q. Did you do anything about placing warning signs on the stern?

“A. The second mate does that. He is aft. It is his job. When he goes up he always puts those out.

“Q. Did you see him put the warning signs out?

“A. I didn’t see him do it, but he does it all the time, and I seen the signs afterward so I know they were there.

“Q. Had you seen the signs over when you made these entries in the log?

“A. No; I didn’t actually see it.

“Q. You assumed they were over when you made this log?

“A. Well, he always puts them over. I seen them after I [22] went out; after this happened I seen them, the boards over. I know he put them over.

“Q. Had you seen the boards before this event, this damage to the propeller, occurred?

“A. Actually I didn’t see it, no. The second mate, I know he put them over.

“Q. What was your first awareness that anything had happened?

“A. Well, the mate came down—I think it was the second or third mate’s room, and the mate come in——

“Q. Who was the mate?

“A. Mr. McLaughlin.

“Q. Was he chief officer? A. Yes.

(Deposition of Maurice Judy.)

“Q. He came to the room?

“A. Yes; he came in and said something about something hit the propeller. I don't know exactly the words. I don't know what words he used. But we all went back.

“Q. Who was in the room with you when this occurred?

“Mr. Howard: If you know.

“A. Oh, when I secured everything on the bridge I was by myself up there.

“Mr. Howard: In the mate's room?

“Mr. Biele: In the mate's room, when the chief officer told you about it?

“A. I believe it was the second mate. I am not sure, but I [23] think it was the second mate.

“Q. Now, had you been relieved of your watch by the second mate after finishing up?

“A. No. Here is the way it is, you see: We have a night mate. The night mate is on, too. We have the cargo watch. The third mate, as soon as we dock, he is on cargo watch. He was out on deck, Mr. Edwards.

“Q. Had you been relieved of your duties?

“A. Oh, yes. I am relieved of my duties when I leave the bridge.

“Q. Who was the night mate at this time?

“A. I will have to look and see here.

“Q. If you know.

“A. Well, it is in the log book here. No; wait a minute. At 1905 he came aboard.

“Q. Who was the night mate, if you recall?

(Deposition of Maurice Judy.)

“A. The night mate, A. Dugan, License 183029.

“Q. Had you seen the night mate before this was reported to you?

“A. No; I don't believe I did. No; I guess we let the other one go in Seattle, and this fellow came aboard over here, because here is where he came aboard, at 1905.

“Q. Was the third mate in the room with you when this was reported?

“A. No; the third mate, I believe, was on deck. He was on [24] watch.

“Q. Did you see the scows coming alongside the Cotton State? A. Up by the hatch of No. 2?

“Q. Yes.

“A. Yes; I saw them coming up there, but the mate was down on the deck and he got that information.

“Q. I am referring to when the scows were first brought alongside the ship. Did you observe them?

“A. No. 1840 they brought the barges alongside. 1845 is when that barge hit the propeller. That I didn't see.

“Q. Did you observe the tug bringing the scows up alongside?

“A. Well, I didn't notice that too much, no. I seen the barges alongside, but I didn't pay too much attention to it.

“Q. Where were you when you saw the barges alongside? A. I was on the bridge.

“Q. Were you still writing your log then?

“A. Yes; I was writing the log then, taking the

(Deposition of Maurice Judy.)

weather, and so on and so forth. I didn't pay too much attention. I seen the barges alongside at No. 2. That is all I seen.

"Q. Now, where was the tug when you made this observation of yours?

"A. Well, I don't remember exactly. I think it was alongside the barge. I am not sure. I think he delivered the [25] barges up there——

"Q. Do you recall in what way the barges were made up?

"A. No. You mean when they brought them up to the ship?

"Q. Yes.

"A. No; I don't remember. I believe they were in tandem. I couldn't say for certain.

"Mr. Howard: If you don't know, don't try to say, Mr. Judy.

"A. I think when they come along—I believe he had them towing astern. I am not sure. No; I can't say for sure.

"Q. (By Mr. Biele): You saw these barges up by No. 2, you said?

"A. I don't know whether it was 2 or 4. I think they got them along the starboard side. I didn't pay too much attention to where he put them right then. I just noticed them coming along.

"Q. Wait a minute. You were on the bridge, were you not?

"A. Yes. I just looked out and I seen them coming and I kept on with my work.

"Q. Isn't the bridge at the forward part of the

(Deposition of Maurice Judy.)

superstructure of the vessel? A. Yes.

“Q. The house of the vessel?

“A. Yes; it is.

“Q. The barge was forward of where you [26] were?

“A. Well, I don't know. I might have been out on the wing of the bridge taking the temperature or something. I don't know exactly. You see things like that—I didn't know there was any accident. You can recall things that you have done, but I can't say exactly where I was at. I was on the bridge, I know that, but I don't know exactly what part of the bridge I was on. But as far as the barge striking, or whatever happened, I didn't see it.

“Q. When the vessel finished tying up was anyone placed back aft?

“A. The second mate ties up.

“Mr. Howard: Were you through with your question, Mr. Biele?

“Q. (By Mr. Biele): Was anybody placed back aft when the vessel tied up?

“A. Sure. The second mate and sailors.

“Q. Was anybody stationed back aft?

“A. You mean after the vessel was all secured?

“Q. Yes.

“A. No. There is nobody stationed back aft, no. You see, the mate that goes on watch, his duties are to see that all the hatches are working and to take care of all over the ship. Now there was the

(Deposition of Maurice Judy.)

third mate, but what part of the vessel he was in, I don't know. [27]

“Q. Did you detail anyone to observe the approach of the barges alongside?

“A. Me? No; I haven't got anything to do with detailing nothing.

“Q. Was anyone stationed back aft as a lookout?

“A. Nobody is stationed as a lookout when the ship——

“Q. Just a minute, Mr. Judy. I am not finished yet.

“Mr. Howard: Just listen until you are sure that he has given you the full question before you try to answer. Be sure you hear the full question.

“The Witness: I know.

“Mr. Howard: Just wait now for the question.

“Q. (By Mr. Biele): Was there anyone, to your knowledge, stationed back aft on deck in the vicinity of the propeller to watch or look out as the vessels approached?

“Mr. Howard: At what time?

“The Witness: At what time? After the ship was secured?

“Q. (By Mr. Biele): Immediately after security.

“A. No; it is not a practice of having a lookout back aft after the vessel is secured. It is not a practice. I don't say there wasn't anybody back there.

“Q. Were you aware that scows were to be landed alongside the starboard side?

(Deposition of Maurice Judy.)

“A. When we docked? [28]

“Q. Yes.

“A. No; I wasn't aware of what they were going to do at all.

“Q. Were you aware that cargo was to be loaded?

“A. Yes, but I didn't know whether it was going to be loaded from barges or scows or from the dock. Nobody tells us that.

“Q. Were you aware that the jacking gear on the propeller was engaged shortly after the vessel finished tying up?

“A. That will have to be answered by the engineers. I don't know.

“Q. You were not aware that it was?

“A. I don't know, I tell you. I don't know whether it was or whether it wasn't.

“Q. Was that ever called to your attention?

“A. It never is. The only time they call it to our attention, when they want to turn the propeller over when they are in port, then they ask us to go back and see if the stern is clear before they turn the propeller over.

“Q. Is that done when they engage the jacking gear?

“A. Yes; that is right. Before they turn it over they ask one of us to go back to see if the stern is clear. In this case, I don't know. I can't say, because we had just docked.

“Q. No one apprised you of that fact, in any event?

(Deposition of Maurice Judy.)

“A. Nobody said one way or the other. [29]

“Q. What is the name of the second mate?

“A. L. Cicero.

“Q. That is the gentleman that was in the room with you?

“A. Yes, if I recall right. I believe it was the second mate.

“Q. What is the name of the third mate that was on the vessel at that time?

“A. Mr. Edwards.

“Q. You don’t know what he was doing, as I recall you said?

“A. Well, he was down on the deck. I don’t know what part of the vessel he was on. He was on the cargo watch. What part of the vessel he was on, I don’t know.

“Q. Who was the master of the vessel?

“A. The master?

“Q. Yes. A. C. W. Meier.

“Q. Was he with you in the second mate’s room? A. No.

“Q. Do you know what he was doing?

“A. He probably was in his room. He just came down from the bridge. He was on the bridge when we got in, and when we were finished with the engines he goes below.

“Mr. Howard: Mr. Judy, if you don’t know, don’t try to speculate where he was. If you don’t know where he was, don’t say he was probably somewhere. [30]

“A. He leaves the bridge, and where he goes——

(Deposition of Maurice Judy.)

“Mr. Howard: You just don’t know where he went.

“Q. (By Mr. Biele): Was the master on the bridge when you wrote up the log?

“A. Not when I wrote it up. He was up there until we finished with the engines.

“Q. Until 1835?

“A. Yes. Then he leaves, and I do the rest of the stuff.

“Q. Now, do you know whether any preparations were being made to handle the lines from the scows that might come alongside?

“A. Whether we had made any preparations?

“Q. Yes.

“A. Well, the ship hadn’t made any preparations for lines, but the mate and the crew was out and I believe they took the lines. They were still tying up. They were still on deck, I believe. It has been a long time ago. I am not sure. I couldn’t say for sure whether the ship’s crew handled the lines, but I imagine they did.

“Mr. Howard: I ask you again, Mr. Judy, not to imagine or speculate. If you don’t know, just say you don’t know. That is all we are interested in, is what you know.

“The Witness: I didn’t see them take the [31] lines, no.

“Mr. Howard: All right.

“Q. (By Mr. Biele): Now, Mr. Judy, have you in your seafaring employment taken scows alongside vessels?

(Deposition of Maurice Judy.)

“A. What do you mean, have I taken them alongside? Have I secured them?

“Q. Have you secured them alongside?

“A. I have secured scows or barges at times, yes.

“Q. Have you secured them?

“A. All we do is handle the lines. We just make the lines fast on the deck, and they do the securing on the barge.

“Q. Have you observed the placing of a watch or a lookout in the vicinity of the propeller when scows are likely to come close to the propeller?

“A. If the mate on watch sees a barge coming he generally looks himself, the mate on the cargo watch. He is a general lookout. I mean there is times that you are doing something else that you can't see, but, as a rule—at least, I do when I am on watch; if I see a barge coming I watch it.

“Q. Do you also detail a seaman to go back in the vicinity of the propeller if a barge is——

“A. That is not the practice. If a seaman is off watch—when they get through tying up they are off. We don't have a seaman on watch; that is, at night, you know; [32] just the mate is on watch, the night mate and the ship's mates.

“Q. If you had a crew available, would you do that?

“A. Well, if I had a crew available, I would—maybe I would. But it is not the practice of putting a crew back there. It is the practice of the mate on watch to look out for that stuff.

(Deposition of Maurice Judy.)

“Q. Does the mate do the tying up completely by himself?

“A. Well, it all depends. If you are out there by yourself you will take the lines. If you have any sailors around, they will take the lines. Sometimes a barge comes along and there isn't anybody there, and then you take the lines. But if you had sailors, why, you would have them take the lines.

“Q. If you had a sailor available, would you detail him to observe the approach of a barge or scow in the vicinity of the propeller?

“A. You mean me, personally?

“Q. Yes.

“A. No; I wouldn't detail a sailor to do that job. I would do it myself.

“Q. You would do it yourself?

“A. Personally if I was on deck, yes.

“Q. So if you had any doubt about it——

“A. I would do it myself, yes. [33]

“Q. Is there a means of communications from the deck of the Cotton State to the engine room?

“A. Yes.

“Q. From back aft, in the vicinity of No. 5?

“A. Well, there is a phone on the poop deck in the steering station up on top.

“Q. Is that connected to the engine room?

“A. Yes; it is connected all over. I mean it is a telephone—it is a dial system.

“Q. You can talk any place in the ship?

“A. I can converse with the engine room or——

“Q. Is there any telegraph system or means of

(Deposition of Maurice Judy.)

transmitting orders from the after part of the deck? A. A telegraph back aft?

“Q. Yes.

“A. No. The only thing you have is the telephone. The telegraphs are on the bridge, one on each wing and one on the wheelhouse.

“Mr. Biele: I believe that is all.

“Cross-Examination

“By Mr. Gantt:

“Q. I just have a couple of questions, Mr. Judy. I believe you said you didn’t actually see the scow or barge hit the propeller? [34]

“A. Oh, no; I didn’t see that.

“Q. You were not anywhere in that vicinity?

“A. No.

“Q. You were below decks?

“A. No; I didn’t see that at all. I was either on the bridge writing the log or I was down below at the time it happened. I imagine I was still on the bridge. I may have been, or I may have been down below. I don’t know just how long it takes until I leave the bridge—I write the log and leave. I never pay attention any time to what time I leave the bridge exactly. I don’t look. There is no occasion for me to look, so if I were to tell you the exact time I left the bridge, that would be an exception. I mean, I don’t”——

Mr. Howard: That concludes the deposition.

Mr. Biele: That concludes the deposition.

The Court: This deposition is received as a part of the libelant's case in chief with like effect as if the witness were present and testifying in person under oath. You may proceed with the next deposition. I think we can go forward at least for a bit longer. McLaughlin and Green and Boltz are in this same volume.

Mr. Howard: Your Honor, some of those depositions of the men that were taken there, we will have some of those in person. I would like to call as [35] the next witness Mr. McLaughlin.

The Court: Come forward and be sworn as a witness.

ETHON C. McLAUGHLIN

called as a witness in behalf of libelant, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Howard:

Q. Will you state your full name and your residence address, please, sir?

A. Ethon C. McLaughlin.

The Court: How do you spell the first word?

A. E-t-h-o-n.

The Court: And the middle initial?

A. C.

The Court: McLaughlin?

A. Yes, sir.

The Court: L-a-u-g-h-l-i-n?

A. Yes, sir.

(Testimony of Ethon C. McLaughlin.)

The Court: Where did you grow up as a youth, Mr. McLaughlin?

A. In the West Indies, in Grand Cayman.

The Court: You may proceed.

Q. (By Mr. Howard): What is your residence address, Mr. [36] McLaughlin?

A. Box 361, Edgartown, Massachusetts.

Q. And what is your age? A. Sixty-two.

Q. Do you have any licenses as a deck officer issued by the Coast Guard? A. Yes, sir.

Q. And what licenses do you hold at the present time? A. Master's.

Q. How long have you held a master's license?

A. That is the sixth issue.

Q. How many years is that?

A. That will be thirty years.

Q. Thirty? A. Thirty years.

Q. Is that license limited or unlimited as to tonnage and the locations? A. Unlimited, sir.

Q. Unlimited? A. Yes.

Q. Both as to tonnage and location?

A. Yes, sir.

Q. How many years have you been going to sea, Mr. McLaughlin? A. Forty-six years, sir.

Q. Are you presently assigned to any [37] vessel? A. Not at this particular time, no.

Q. You are now—where have you been living most recently?

A. In Massachusetts, sir. Edgartown, Mass.

Q. And you're out here in Seattle for the purpose of this trial? A. Yes, sir.

(Testimony of Ethon C. McLaughlin.)

Q. What type of vessels have you served on most recently under your license as a master, your license from the Coast Guard?

A. Victory, sir.

Q. Victory type ships?

A. Yes, sir, and C-2's.

Q. C-2's? A. Yes, and Liberties.

Q. And Liberty ships. What was your last ship assignment?

A. My last ship assignment was chief officer on the Constitution State.

Q. And what type of vessel is that?

A. A Victory ship, sir.

Q. And is that a turbine driven ship?

A. Yes, sir.

Q. Is that the same type of propulsion that was on the Cotton State? A. Yes, sir.

Q. Who was your last employer, Mr. [38] McLaughlin? A. States Marine, sir.

Q. And when was it that you last served on that vessel, the Constitution State?

A. May the 29th was my last——

Q. May of 1958? A. This year, 1958.

Q. And your position was chief mate?

A. Chief officer, yes, sir.

Q. Did you some time prior to that serve on the Cotton State? A. Yes, sir.

Q. And who operated that vessel?

A. States Marine.

Q. And what type of vessel is that?

A. She's a C-2, sir.

(Testimony of Ethon C. McLaughlin.)

Q. How long did you serve on the Cotton State, Mr. McLaughlin, approximately?

A. I'm not sure what time I left, but it was about four months, I think, four or six months, somewhere around in there.

Q. And in what position?

A. Chief officer, sir.

Q. Who was master of the vessel at the time?

A. Mr. Meier, sir.

Q. Now, Captain, would you describe for us——

The Court: You were there January 10th [39] what year? Were you on that vessel on January 10th?

A. '57, yes, sir, 1957.

The Court: Very well. You may inquire.

Q. (By Mr. Howard): How long had you been serving on the Cotton State before January 10, 1957, if you recall, approximately?

A. I think it was September the year before, something like that.

Q. Will you describe this C-2 type vessel such as the Cotton State? About how long is it?

A. I think she's around 450, 459 or 460 feet, sir, somewhere in there.

Q. In length? A. In length, sir.

Q. What is the beam or breadth of the vessel?

A. The beam is around 60 to 62 feet, somewhere in there, sir.

Q. How many cargo hatches are there on a C-2 vessel such as the Cotton State?

A. Five, sir.

(Testimony of Ethon C. McLaughlin.)

Q. And where are those located with reference to the midship house?

A. One, two and three is forward of the midship house, four and five is aft of the midship house.

Q. Have you made an examination of a plan of a C-2 type [40] vessel such as the Cotton State recently at my request? A. Yes, sir.

Q. And have you determined from that plan, Captain, what the distance would be from the forward end of the midship house to a point at the stern of the vessel? A. Yes, sir.

Q. And what point at the stern of the vessel was used for that calculation?

A. The end of the rudder.

Q. And where is the propeller located with reference to the rudder?

A. Forward of the rudder.

Q. So the calculation you have made from the forward end of the midship house is aft beyond the propeller to the forward end of the rudder?

A. Yes, sir.

Q. And what is the footage that you determined? A. 188 feet, sir.

The Court: What was the name of that place, Grand what in the West Indies?

A. Grand Cayman, sir.

The Court: C-a-y-m-a-n?

A. Yes, sir.

The Court: What was the date you are now speaking of? [41]

(Testimony of Ethon C. McLaughlin.)

A. January the 10th, sir.

The Court: These measurements were made as of January 10th?

A. These measurements, sir?

The Court: Yes.

A. No; they was just recently, sir.

The Court: But at any rate the time of the occurrence of the things of interest to you in making the measurement was on the date January 10th?

A. Yes, sir.

The Court: Of this year?

A. Yes, sir.

The Court: Is that right, 1958?

A. The time that I made the measurement was——

The Court: No; the occurrence of the events that inspired your interest to measure that vessel at that place occurred, did they, on January 10, 1958?

A. Yes, sir—1957.

Q. (By Mr. Howard): Now, Captain, I would like to have you refer to Exhibits 1 and 2——

Mr. Howard: Which I now offer in evidence if they have not already been admitted.

The Court: They have not been. Any objection?

Mr. Biele: No objection.

The Court: Each of them is now admitted. [42]
The first one is the logbook, the rough deck logbook, and the next one is the photostat of one page of the bell book, No. 2 that is.

(Testimony of Ethon C. McLaughlin.)

(Libelant's Exhibits Nos. 1 and 2 for identification were admitted in evidence.)

Q. (By Mr. Howard): Do you recognize the document which is before you identified as Exhibit 1?

A. Yes, sir.

Q. And what is that, Captain?

A. That's a logbook.

Q. Does that cover the period of the date of the accident?

A. Yes, sir.

Q. Does your name appear on the page for January 10, 1957?

A. Yes; in the bottom.

Q. Did you make any of the entries on the page itself?

A. No.

Q. What is the reason for your name appearing on the page?

A. Each officer on watch writes up his own watch, and at the end of the day when it's put in the logbook the master and the chief mate signs it, examine it and sign it.

Q. While you're at it, Captain, would you tell us what your duties were generally as chief mate on the Cotton State as of the date on January 10, 1957, when this accident occurred? [43]

A. Well, we left Seattle and was coming into——

Q. No; excuse me, just generally what your duties as chief mate would consist of.

A. Oh. Oh, well, it's to take care of the entire cargo, tie up the ship and see that everything is in operation, is working.

(Testimony of Ethon C. McLaughlin.)

Q. How many other mates are there on the Cotton State? A. Three other mates.

Q. Do you serve a watch?

A. I do not, sir.

Q. Captain, after the entries have been made in the rough logbook which you have before you as Exhibit 1, are they transcribed into another document?

A. Yes; what we call the smooth log.

Q. Handing you what has been identified as——
The Clerk: Libelant's 3.

(A smooth deck logbook was marked Libelant's Exhibit No. 3 for identification.)

Q. (By Mr. Howard): ——No. 3——

The Court: That is the smooth deck log?

A. Yes, sir; the smooth deck log.

The Court: Is it or is it not the permanent record of the ship respecting the deck department's activities?

A. Yes, sir. [44]

Q. (By Mr. Howard): And will you state how the entries in the smooth log compare or differ from the entries in the rough log?

A. They should compare exactly, sir.

Q. And who writes up the smooth log?

A. On this particular ship the third mate writes the logbook, sir, the smooth log.

Q. Can you identify that Exhibit 3 as the smooth logbook covering the period of the date in question? A. Yes, sir.

(Testimony of Ethon C. McLaughlin.)

Mr. Howard: I offer that in evidence, your Honor.

Mr. Biele: No objection.

The Court: Admitted.

(Libelant's Exhibit No. 3 for identification was admitted in evidence.)

Q. (By Mr. Howard): Captain, as chief mate on the Cotton State, what would be your station, your position or your duty at the time the vessel was approaching a dock to make a landing?

A. Well, we had what we call standby, and we call it fore and aft. The chief officer will take part of the men and go forward and the second mate, if he's on watch, he'll be relieved from the bridge by either the third or four mate and he takes the other half of the men [45] and go aft and stand by for tying the ship up.

Q. And who would be on the bridge?

A. And that's done before we enter the dock.

Q. And who would be on the bridge during the docking?

A. Well, the officer that relieve the second mate. They take turns in relieving him.

Q. Now, do you recall the occasion on the evening of January 10th when the Cotton State, afternoon or evening of January 10 when the Cotton State proceeded from Seattle to Everett, Washington?

A. Yes, sir.

Q. And what station did you take when the vessel was approaching to make a landing at Port

(Testimony of Ethon C. McLaughlin.)

Dock No. 1? A. On the bow, sir.

Q. How many men did you have with you, approximately? A. Seven men, sir.

Q. And what duties were you engaged in at that time? A. To tie the ship up, sir.

Q. And will you describe for us just what you did in tying the ship up on that occasion?

A. Yes, sir. When the ship comes in, comes to the dock far enough ahead, we was ordered to put the line out from the bridge. All orders come from the bridge, and usually we put the spring out first to keep her from going too far, and then to make her fast. We get these [46] lines out and when they're secure enough, when two lines is on the bow and two on the stern, usually you get stand by, finished with engine, and when I get orders forward to make her fast, then we completes the job of making her fast and putting on rat guards and so on.

Q. Now, what did you do on this occasion?

A. On this occasion we tied the ship up, put the rat guards on, and I walked aft.

Q. Incidentally, can you tell us what the draft of the Cotton State was at the stern when the ship arrived at the Port Dock in Everett harbor?

A. Eighteen—

Q. You may refer to the logbook, if it would appear in there.

A. (Referring to Libelant's Exhibit No. 3.) Eighteen six, sir.

Q. That's eighteen feet, six inches?

A. Yes, sir; eighteen feet, six inches.

(Testimony of Ethon C. McLaughlin.)

Q. That's the draft at the stern?

A. That's the draft at the stern.

Q. Now, Captain, do you know what the diameter of the propeller was on the Cotton State?

A. Nineteen feet, six, sir.

The Court: Nineteen feet?

A. Yes, sir.

The Court: That is a pretty good sized propeller, is it not? [47]

A. Yes, sir.

The Court: Is it single or double screw?

A. Single screw, sir.

Q. (By Mr. Howard): With that size of propeller and with the draft at the stern of the vessel which you testified existed at the time the vessel came into the dock at Everett, how much, if any, of the tips of the propeller blades would appear above the surface of the water when the blades were in the vertical position, approximately?

A. The blade is covered 20 feet, six inches or nine inches, I'm not exactly certain of the inches.

The Court: Wait just a moment. Mr. Reporter, will you read his answer?

(The reporter read the last answer.)

The Court: I do not know what he means.

Mr. Howard: Maybe I can clear it up.

The Court: Is the fourth word "called," c-a-l-l-e-d?

A. Covered, I meant.

The Court: I do not understand the word you used.

(Testimony of Ethon C. McLaughlin.)

A. Under water, sir.

The Court: I do not want an explanation of it, sir. You mean it is covered?

A. Yes, sir. [48]

The Court: The blade is covered?

A. By water.

The Court: Is that what the word was? Was the word "covered"?

A. Yes, sir.

The Court: And by "covered," as you explained when the Court interrupted you, it is covered by water, is that what you mean?

A. Yes, sir.

The Court: You may inquire.

Q. (By Mr. Howard): Now, with the draft of the vessel that you testified existed at the stern, what, if any, portion of the tips of the blades would be above the level of the water at that time?

A. Two feet three inches, sir, approximately.

Q. Now, Captain, will you describe for us what, if any, warning signs or devices or lights were carried at the stern of the Cotton State to warn vessels of the propeller?

A. On the port and starboard side it's a five by three board usually painted in black background with red letters four to six inches with the words, "Warning, Propeller, Keep Clear," I think is the exact words.

Q. The size of that board again, please?

A. The words on the board? [49]

Q. No; the size of the board.

(Testimony of Ethon C. McLaughlin.)

A. The size, three by five.

Q. Is that feet?

A. Yes, sir; three by five feet.

The Court: Where is that located?

A. That is fastened on the rail on each side of the ship.

Q. (By Mr. Howard): At what point, Captain, with reference to the stern?

A. Right over the propeller, approximately over the propeller.

Q. Well, referring to the center line of the stern, the extreme stern, where would these boards be with reference to that point?

A. On the outside forward abreast of the propeller—above the propeller.

Q. Yes. Would those be on the railing itself?

A. On the railing itself.

Q. At what deck? A. On the top deck.

Q. The weather deck?

A. Yes; on the weather deck.

Q. Is there any other kind of a warning device, light or sign?

A. And we have approximately from nine to fourteen feet [50] two by four or two by six painted white and red stripes the full length, and in the center of that it's a globe, cluster light—not a cluster light, a round light with a red globe on it with the bulb inside and the wire extending from that up to the stern of the boat plugged in a receptacle.

Q. All right, now let's go back on that. This is

(Testimony of Ethon C. McLaughlin.)

a board or timber about nine to fourteen feet in length? A. Yes, sir.

Q. And it's made up of a two by four or a two by six? A. Two by six, yes.

Q. And that is suspended in what fashion?

A. That is suspended by the end of a rope, by two pieces of rope on each end.

Q. And hung from what point?

A. From a point forward of the propeller to a point aft of the propeller.

Q. On which side of the stern?

A. On both sides of the stern.

Q. And when is that hung in place?

A. That is hung in place at the time they tie up, on every occasion.

Q. You have referred to a light, a red light, and where is that located on the board or with reference to the board?

A. In the middle of the board. [51]

Q. And is that a steady light or a flashing light?

A. A flashing light.

Q. About what power, Captain?

A. Well, it's around usually a 60-watt bulb.

Q. And where is the source of supply of the electricity that illuminates that light?

A. That comes from a receptacle in the stern, right dead aft on the stern.

Q. You say a receptacle. Do you mean an outlet that you plug into? A. Yes, sir.

Q. Going back now to the propeller warning board containing the legend, "Warning, Propellers,

(Testimony of Ethon C. McLaughlin.)

Keep Clear," is that a permanent fixture or is that a removable fixture on the Cotton State?

A. A removable fixture. We takes it up in tying up and letting go.

Q. And how is that attached to the rail of the ship?

A. That is attached by a line at each end. It extends down about six feet, about four to six feet above water.

Q. Now, Captain, I don't understand. The propeller warning board that you have previously described as being up on the rail of the ship, is that a removable fixture or a permanent fixture?

A. Permanent fixture, sir. [52]

Q. And how is that attached to the rail of the ship?

A. It's made fast at each end in four places on the rail, the top and bottom, the top and bottom rail, both ends.

Q. And is that illuminated in any way?

A. Well, in practice we have one cluster light, whichever side of the ship is docked. In this case the ship was port side to the dock and that would be on the starboard side, one cluster light.

Q. I see. Now, Captain, we're going back to the time when you state that you were on the bow of the vessel and you completed tying up the vessel with lines at the bow of the vessel and you started to walk aft. Where did you go on the vessel then?

A. I left forward and I started to walk aft, and when I got right in the middle there I noticed

(Testimony of Ethon C. McLaughlin.)

a man standing on the poop, that's on the cabin deck, and I was coming aft on the portside. I went up the steps and I went across to meet the man that was standing there.

Q. Excuse me. Where was this man standing, please?

A. Midship of the house, forward end.

Q. That would be at the forward end of the midship house? A. Yes.

Q. And in the mid line of the ship?

A. The mid line of the ship.

Q. Yes. [53]

A. And I went on the portside and walked over towards to him and speaks to him.

Q. Who was this man?

A. I don't know, sir. I didn't ask the man his name.

Q. Was he a member of the ship's crew?

A. No, sir.

Q. Was he representing the ship in any way?

A. No, sir.

Q. Did you have a conversation with him at that time? A. I did, sir.

Q. What did you do thereafter, Captain?

A. Well, he says to me, he says, "I'd like to have a line to tie up the tug." Well, that is also a procedure that we has to furnish line for the tugs, all ships.

The Court: That word I do not get, "thirds" or "tugs"?

A. Tugs, sir.

(Testimony of Ethon C. McLaughlin.)

The Court: Tugs?

A. Yes, sir.

The Court: You may proceed.

Q. (By Mr. Howard): And did you have lines available for the purpose of tying up tugs or barges? A. Yes; we had.

Q. Describe to us where the closest lines were that you had available. [54]

A. They was under the step on the starboard side.

Q. Under the step?

A. Yes; on the main deck. We were then standing upon the cabin deck.

Q. What did you do with respect to this request for barge lines?

A. I told him I had them all ready, and at that time I left the boatswain forward putting on the rat guards, and I just waited and him and I was talking—in fact, we wasn't talking, he was talking to the tug man, and——

Q. Who was talking to the tug?

A. This man that I just described.

Q. All right.

A. I thought he was from the lumber company. So the boatswain come along later on and I asked him to get these lines and also to get a man to stand on the deck for the next line, and in the meantime this gentleman told the tug man, he says, "I want that barge," that he was tied up to, that's the forward barge, "I want that barge at number four and I want the after one at number two."

(Testimony of Ethon C. McLaughlin.)

Q. All right. Now, Captain, you have referred to a tug and barges. Will you tell us what you had observed at this time as to where the tug and barges were?

A. They was at the forward corner of the bridge.

Q. What was there, the tug or the barge? [55]

A. Well, the forward barge was right abreast of the bridge.

Q. I see. And where was the tug then?

A. The tug was on the outside corner.

The Court: Which corner?

A. The starboard corner of the tug.

The Court: On which side——

A. Of the barge.

The Court: With respect to cardinal directions on which side of your vessel were the tug and tow?

A. On the starboard side, sir.

The Court: Was that west or east or north or south?

A. That is looking forward from aft, sir, the right-hand side.

The Court: Yes, sir, but do you know which way the compass directions were as you were docked there, as your *Cotton State* was pulled into the dock? Was this moorage or being alongside of the tug and tow on the westerly or easterly, northerly or southerly side of the vessel?

A. The northerly side.

The Court: Pardon?

A. The northern side.

(Testimony of Ethon C. McLaughlin.)

The Court: The northern side. What place, at what dock was the Cotton State at this time? [56]

A. No. 1 dock in Everett, Washington.

The Court: You may proceed. The Court will——

Mr. Howard: Now, may I have this sheet of paper marked so the witness can use that?

The Court: You may do so. Let it be marked, Mr. Clerk, as Libelant's Exhibit 4.

(A blank sheet of paper was marked Libelant's Exhibit No. 4 for identification.)

Q. (By Mr. Howard): Now, Captain, on that sheet of paper, can you outline for us, please, just the general outline of the Port Dock No. 1 at Everett and the position of the Cotton State alongside the dock? Would you like a ruler or a straight edge of some kind on that?

A. All right, sir.

The Court: A better plan, if this is an illustrative drawing, is to ask him what the fact is and then tell him to illustrate it, unless opposing Counsel has an objection. It may be that this drawing will serve opposing Counsel the same useful purpose as it will the libelant.

Mr. Biele: I have no objection, your Honor.

The Court: Very well. Go right ahead, then.

Q. (By Mr. Howard): I believe you already testified, Mr. McLaughlin, as to the portside landing of the Cotton State at Port Dock No. 1, [57] Everett?

A. Yes, sir.

(Testimony of Ethon C. McLaughlin.)

Q. All right. Will you show the position of your vessel as you described it? A. Right, sir.

(Witness drawing.)

The Court: You do not have to be too accurate, Captain. Just a rough draft. Will you indicate by words the portside and the starboard side of your Cotton State and the bow and the stern?

A. This is the portside and this is the starboard side.

The Court: Now put the words "bow" and "stern."

A. Yes.

(Witness writing.)

Q. (By Mr. Howard): Captain, would you also show on that the midship house which you have described and mark in the approximate position?

The Court: Just write right in the vessel the relative location as between the stern or prow of the vessel.

(Witness drawing.)

The Court: If you know the numbers of those squares, will you put the numbers in there?

A. Yes, sir.

(Witness writing.) [58]

The Court: What do those squares represent?

A. The hatches, sir.

The Court: Very well, and will you put inside

(Testimony of Ethon C. McLaughlin.)

the space that you have marked off in your way as the house——

A. That's right, sir.

The Court: Write in there what it is, house or bridge or what.

A. Well, we call it the midship house.

The Court: Very well. Now, will you let Counsel see that, and this will terminate our proceedings today.

(The document was handed to Mr. Howard.)

The Court: Let Mr. Biele also see it.

(The document was handed to Mr. Biele.)

The Court: The directions of east and west are not there. I believe he said the bow was to the northward, did he not?

Mr. Howard: Was that his testimony?

Mr. Biele: Yes; the bow was to the north.

The Court: The stern of the ship was to the southward and the bow of the vessel was to the northward, is that what you indicated?

A. No; I think the bow was east and west. I meant the side of the barge was on the north of me. [59] I'm not sure of that because I really don't know the direction of that dock.

The Court: The Court does not either. That is the reason you were asked the question. Do you wish to offer this?

Mr. Howard: Yes, your Honor.

The Court: Is there any objection?

(Testimony of Ethon C. McLaughlin.)

Mr. Biele: No, your Honor.

The Court: Let it be received in evidence.

(Libelant's Exhibit No. 4 for identification was admitted in evidence.)

The Court: I assume you offer it to illustrate the witness' testimony, do you not, not as independent evidence?

Mr. Howard: That's correct, your Honor.

The Court: That is all for today. Those connected with this case are excused until 10:00 o'clock tomorrow morning and you may be excused until that time, Captain.

A. Yes, sir.

The Court: Captain, what languages have you spoken, if any, besides English in your formative years when you were growing into manhood or since you have been a man? Have you used any other language but English?

A. Spanish, sir. [60]

The Court: Spanish?

A. Yes, sir.

The Court: Anything else?

A. Nothing else.

The Court: Thank you. Do you believe that your way of emphasizing syllables and of speaking words is the West Indian edition of the English way of speaking?

A. Yes, sir; what we call potwa. Otherwise——

The Court: That is an influence of French, is

(Testimony of Ethon C. McLaughlin.)

it not, or of something that had its original origin in the French language?

A. Yes. We use the same thing because it's not the real thing.

The Court: Court is now adjourned until tomorrow morning at 10:00 o'clock.

(Thereupon, at 5:00 o'clock p.m., a recess herein was taken until 10:00 o'clock a.m., Wednesday, November 26, 1958.) [61]

November 26, 1958—10:30 o'Clock A.M.

(All parties present as before.)

The Court: You may proceed in the case on trial.

ETHON C. McLAUGHLIN

resumed the stand.

Direct Examination

(Continued)

By Mr. Howard:

Q. Going back now to the description that you gave, Captain, of what was done after you tied up the line to the forward end of the ship, can you point out to us on Exhibit 4 the position on the ship where you met this man who requested barge lines? A. Yes, sir.

Q. And would you make a mark on that exhibit at that point to illustrate the point where you met the man? Mark it "A."

(Testimony of Ethon C. McLaughlin.)

Q. Now, can you also draw on Exhibit 4 the approximate position of the tug Lea Moe at this time that you are testifying to? [64]

(Witness draws on Ex. 4.)

Q. And would you mark "LM" in that to identify the tug? A. Yes, sir (writing on Ex 4).

Q. Now, did you observe another barge behind or aft of the barge which came in contact with the ship?

A. Yes, sir; I observed a pile of lumber in line with that, it was so high I knew it had to be on a barge, but all I could see was the top of the lumber.

Q. Could you determine from your position at Point C on Exhibit 4 where the stern end or the after end of that tow was with respect to the stern of the vessel? A. No, sir; I could not.

Q. Why not?

A. The lumber was too high.

Q. Too high? A. Yes, sir.

Q. By the way, what was the condition of the light or darkness at that time?

A. Well, it was very dark at that time, but you could see everything around by the lights on the ship.

Q. What was the condition of the visibility?

A. Well, I could see good, sir, from the lights.

Q. But it was dark?

A. But it was dark, yes.

Q. Have you determined what the hour of sunset was on the [65] day this accident occurred?

(Testimony of Ethon C. McLaughlin.)

A. Yes, sir; I did.

Q. And what was the hour of sunset?

A. I got it at 1629.

Q. That would be 4:29 p.m.? A. Sunset.

Q. And how did you determine that, Captain, from what source?

A. By the Nautical—1957 Nautical Almanac, January 10th.

Q. And was that determined for the Port of Everett, Washington? A. Yes, sir.

Q. Now, who was with you, if anyone, at the time you were on the gangway platform at Point C?

A. No one was there. The man that asked me for the line, he was at Point B.

Q. He was at Point B? A. Yes, sir.

Q. What did you observe was done thereafter as far as the position of the tug and barges is concerned?

A. After the two by four had broken, the tug kind of sagged away a little from the ship—I mean the barge kind of come away from the ship a little bit, and then the gentleman at Point B, we'll call it, he was standing there and I went and stood alongside of him, leaned over the rail like this, the two was very close together, [66] and he said to the captain of the tug, he said, "I want that barge up here and this one down here at number four."

Q. In which direction with relation to the bow or stern of the ship?

A. Well, Barge 25 at number five, that's at the aft end of the ship.

(Testimony of Ethon C. McLaughlin.)

Q. Yes.

A. And Barge 15, which was at the after end of this second barge, he wanted that up forward at number two.

Q. Now, Captain, on Exhibit 4, can you draw an outline to represent the second barge that you referred to?

A. Yes, sir (drawing on Ex. 4). Yes, sir.

The Court: For the Court's convenience, will you go back just a moment and state what, if anything, became of that upright two by four which you said the barge man stuck down between the side of the barge and the side of the ship, what became of it?

A. The bottom half that broke dropped in the water.

The Court: That is what I am asking you.

A. Yes, sir.

The Court: What happened to it, if anything happened to it?

A. Yes, sir; one-half dropped in the water. [67]

The Court: I am asking you to state now at this time for the Court's convenience what happened? What did it do?

A. It was in between the ship——

The Court: I understood that.

A. Oh, it protected the ship from the barge from——

The Court: All right, then what happened to it? Did it remain in place as there put?

A. No, sir.

(Testimony of Ethon C. McLaughlin.)

The Court: What happened to it?

A. One half dropped in the water and the other half——

The Court: Why——

A. The bottom half.

The Court: What put it into that condition of having a bottom half and some other kind of a half?

A. The contact between the bow of the barge and the ship, sir.

The Court: Do you wish the Court to understand that you did say or intended to say that the contact squeezed it so that it broke in two, is that what you mean to say or something to that effect?

A. Yes, sir.

The Court: Then what happened after [68] that? What happened to the two parts, if you noticed, the two parts of the two by four?

A. The bottom half dropped down and the other half was in the man's hand and I think he just throwed it on the deck of the barge, sir.

The Court: Then what happened?

A. Then she was——

The Court: She, what is that?

A. The barge.

The Court: All right.

A. The barge——

The Court: The barge did what?

A. The concussion of the barge with the contact with the ship pushed her away again.

The Court: What was it?

(Testimony of Ethon C. McLaughlin.)

A. Pushed the barge away from the ship.

The Court: You may proceed.

Q. (By Mr. Howard): Now, Captain, after this time did the barges which you have described and which are shown on Exhibit 4 move aft or forward along the side of the ship?

A. Not at that particular time. I went back when I seen there was no damage done, I went back and stand alongside of the man that was talking. So he——

The Court: No damage to what? [69]

A. Either the ship or the barge.

Q. (By Mr. Howard): You went back to Point B?

A. Yes, and he spoke to the barge captain—to the tug captain, and described that he wanted this barge forward and the other one aft.

Q. Now, which barge by number did he indicate that he wanted at the forward end of the ship and which barge by number did he want at the aft hatches of the ship?

A. He wanted No. 25 barge at number four hatch at the aft end of the ship and No. 15 barge at the forward end or number two hatch of the ship.

The Court: Who wanted?

A. This man that was standing on the deck with me, sir.

The Court: On the ship's deck?

A. Yes, sir.

(Testimony of Ethon C. McLaughlin.)

Q. (By Mr. Howard): Was he an officer or member of the crew of the ship?

A. No, sir, he was a man from ashore.

Q. Did you yourself have any conversation at that time with the master of the tug or the deck hand from the tug who was on the barge?

A. None whatsoever at any time.

Q. Were there any lines secured between either the tug or either of the barges to the ship at the time this [70] conversation was held?

A. No, sir.

Q. And was the tug in the position that you have shown on Exhibit 4 at the time this conversation was held? A. Yes, sir.

Q. Now, after that time and after you had returned to Point B that you have testified to, was there any movement of the barges along the side of the ship either forward or aft? A. Yes, sir.

Q. And in which direction?

Mr. Biele: Your Honor, may I interrupt a minute so we can take a look at that sketch?

The Court: The request is denied. You may see it later. He is not offering it yet. Are you offering it?

Mr. Howard: I offer it now, your Honor.

The Court: Then you may.

Mr. Biele: Thank you.

Mr. Howard: I believe the sketch was admitted yesterday, your Honor.

The Clerk: It was, your Honor.

The Court: It was. Then the Court at this time,

(Testimony of Ethon C. McLaughlin.)

in view of that fact and also because the Court thinks it should be done, asks that it be shown or [71] offered for viewing to and by Mr. Biele.

(Libelant's Exhibit No. 4 was handed to Mr. Biele and Mr. Crutcher.)

The Court: I wish you would for the Court's convenience again say—you probably have already said it very plainly, but I wish to hear you say again, if you did say or can now say, what movement as to the barges or a barge, if any, was requested by the man you said was a man from shore who then was standing on the deck with you.

A. He said—he spoke to the captain on the tug; he say, "I want No. 25 barge aft at number four," I think was the hatch he mentioned; however, the after end of the ship, "and I want No. 15 at the forward end of the ship at number two." The captain of the barge answered and said, "Why?" He answered him and said, "Because on account of the length of the lumber on these particular barges."

The Court: Was it the barge man or the tug captain who asked, "Why?"

A. The Captain of the tug, sir.

The Court: You may proceed.

(Libelant's Exhibit No. 4 was handed to the witness.)

Q. (By Mr. Howard): On Exhibit 4, Captain, will you please [72] mark the trailing barge or the

(Testimony of Ethon C. McLaughlin.)

after barge which you have described as No. 15, would you put a "15" in the point where you have identified that barge?

A. Yes, sir (writing on Ex. 4).

Q. Did you participate in this conversation in any way that has just been related?

A. No, sir.

Q. Did you undertake to direct in any way the position or the hatches to which the barges were to be delivered?

A. No, sir.

Q. Now, what was done, Captain, after you returned to Point A and what was done with the barges by the tug?

A. The tug just swing around the corner, put her bow to the front of the barge and give it a push, and it went back slowly and it became, when we tied the line it was at Point B, the head of the barge.

Q. Now, Captain, when you say the tug pushed the barges back, which direction would that be with respect to the bow or stern of the Cotton State?

A. To the stern of the Cotton State, sir.

Q. Would you estimate, please, how far the tug pushed the barges back?

A. Well, I think between thirty and forty feet, sir, when we finally tie her up.

The Court: Did that happen following [73] this request from the shore man on the deck of the ship or was there any relationship to that man's request?

A. It followed after he requested the barge to reverse.

(Testimony of Ethon C. McLaughlin.)

The Court: Very well.

Q. (By Mr. Howard): Were there any lines between the ship and the barge or the tug at that time? A. No, sir.

Q. Thereafter was there a mooring line secured between the ship and the barge?

A. No mooring line between the ship and the barge, sir—yes, after. Pardon me, sir. After.

Q. All right. Now will you describe, please, where that mooring line was secured on the ship, referring to Exhibit 4?

A. That was secured at B point, sir.

Q. At Point B? A. Yes, sir.

Q. And what was it attached to on the ship at that point? A. On a cleat.

Q. At what deck level?

A. On the officers deck.

Q. Where is that with reference to the main deck? A. One deck above.

Q. Yes, and where is this cleat with respect to the outer [74] side or the rail of the ship?

A. It was between the rail and the inside part, we call it the fishplate, between the railing and the fishplate.

Q. And who secured that line on the ship at that cleat? A. The boatswain, sir.

Q. The boatswain of the Cotton State?

A. Yes, sir.

Q. And how and by whom was that line secured on the barge?

(Testimony of Ethon C. McLaughlin.)

A. By the barge deck hand, and he secured it on the outside forward corner of Barge No. 25.

Q. Was that line slack or was it taut?

A. Well, when it was throwed to him it was slack, so between the boatswain and I we pulled in the slack—no, the boatswain asked him where to make it fast and he says, “There.”

Q. You asked whom?

A. The barge man hollered and asked—no, the boatswain hollered and asked the barge man where he wanted it made fast and he told him, pointed and told him, “There,” and that was at the cleat where we were.

Q. The man on the barge indicated where he wanted the line made fast on the ship?

A. Yes.

Q. And was that where the boatswain did make the line fast? A. Yes, sir. [75]

Q. And was there anyone else in the vicinity on the ship at that time?

A. Well, just a little aft of me was this same man from ashore. He was standing, well, I’ll say three to six feet away from me, still at the rail.

The Court: Do you know his name?

A. No, sir, I didn’t ask him.

Q. (By Mr. Howard): Now, Captain, on Exhibit 4 by a dotted line or a series of dashes can you indicate where the forward end of the leading barge, No. 25, would come to rest after the barge line had been secured and made taut, the slack taken out of it?

(Testimony of Ethon C. McLaughlin.)

(Witness marks on Ex. 4.)

A. All right, sir.

Q. Captain, at this time on January 10, 1957, did you know what the length of these barges was?

A. No, sir.

Q. Had anyone informed you as to the length of them?

A. No, sir.

Q. Have you at my request recently looked at plans of the ship to determine what the distance would be from this Point B where you have marked it on Exhibit 4 back to the stern of the ship aft of the propeller?

A. Yes, sir.

Q. And what calculation did you make as to the distance in [76] feet?

A. That was 182 to 188 I think it was, sir. 188 feet.

Q. 188 feet?

A. Yes.

Q. Have you also made a calculation as to the distance from the extreme forward end of the mid-ship house back to the same point at the stern aft of the propeller?

A. Yes, sir.

Q. And what is that measurement?

A. That was 218, sir.

Q. Will you tell us, Captain, what happened next after you secured this mooring line to the cleat at Point B on the Cotton State?

A. Well, I was inside the rail, the boatswain outside, so I helped him pull the slack, and I lifted the slack up for him to make it fast and when we made it fast, of course I don't know when I done it but I automatically turned around and looked

(Testimony of Ethon C. McLaughlin.)

aft, and at that moment I saw the barge—the lumber is all I could see, the top of the lumber jam under the counter.

Q. Were there any lights on top of either one of the barges?

A. No, sir, not as I saw. I didn't see no light.

Q. Did you see any lights anywhere, on either Barge 15 or Barge 25, as they came alongside?

A. No, sir, I did not. [77]

Q. Can you describe by marks on Exhibit 4 the position of the barge as you then observed it coming under the stern of the vessel?

A. Yes, sir.

Q. By a series of dotted or dashed lines.

A. All right, sir.

(Witness marks on Ex. 4.)

Q. Captain—— A. Yes, sir.

Q. After the line had been secured between the cleat on the Cotton State and the forward out-board stanchion on the leading barge as you have testified to, will you state whether or not the barges moved either fore or aft alongside the ship thereafter?

A. No, they didn't move after we got the line fast, sir. The barges did not move, they stayed right there.

Q. Now, Captain, what did you do after you made this observation of the lumber on the after barge coming in under the stern counter of the ship?

(Testimony of Ethon C. McLaughlin.)

A. When I saw the barge with the lumber jammed against the stern I turned around and said, "I'll go get my light," and the boatswain said, "My light is over there," but I did not stop, I continued to my room, because I had a good light, and I went to my room, grabbed the light and went right down through the passageway, went right back [78] to the stern.

Q. How long in terms of seconds or minutes did it take you to move from that position at Point B to the stern of the ship by way of your room?

A. Well, I couldn't say exactly, but I don't think it would take more than a minute, sir.

Q. Where did you go on the stern of the ship?

A. I went right at the extreme stern of the ship over the propeller and looked around, and all I could see was the top of the lumber.

Q. Will you describe what you did see as you looked over the rail of the ship?

A. Well, when I looked over it was just the lumber, the top of the lumber that I could see, and of course this red flashing light wire, that was hanging under. I couldn't see where the end of it was or anything, but it just was between the ship and the lumber, and so was the two lines that the board was hanging on, all was just underneath, it go right down and the lumber against it.

Q. You are referring to the propeller warning board?

A. Board, yes, sir.

Q. Striped in two colors with an electric light attached to it that you described in your testimony

(Testimony of Ethon C. McLaughlin.)

yesterday? A. Yes, sir. [79]

Q. As hanging down from the rail of the ship?

A. Yes, sir.

Q. And as I understand, you could see the lines that hung that down over below the deck of the ship?

A. Yes, sir.

Q. On which side, the starboard, the offshore side or the port side?

A. The starboard side, sir.

Q. Did you observe whether the other fixed sign, the propeller warning board sign with the legend on it, was also in place at that time?

A. Yes, sir.

Q. Now, what happened thereafter, Captain? What did you observe?

A. Well, then I walk over to the port side to see if the light there was working, and that was in working condition. Then I just came back to the other side and I waited till the barge pulled—the tug pulled the barge away.

Q. Where did the tug move to to pull the barge out?

A. He moved on just the outside corner of No. 15 barge, and when I got there the one man was standing on that barge throwing him a line, or taking one, I'm not sure.

Q. Were there any lines extended between the trailing, the aftermost barge, and the ship when you moved back to [80] the stern area?

A. No, sir, no line whatsoever.

Q. And as you moved back to the stern area

(Testimony of Ethon C. McLaughlin.)

did you see any lights of any kind on either the leading barge or the trailing barge?

A. No, sir, I did not.

Q. How long would you estimate that took for the tug to get from that position it had been in as described on Exhibit 4 with the symbol "LM" to the point which you described where the tug was pulling the trailing barge out from under the stern of the vessel?

A. Well, I wouldn't say that was any more than about a minute and a half or two minutes, maybe. I'm not sure whether it would take that long.

Q. How many men did you see on the barges at that time when you went to the stern area?

A. One, sir.

Q. And where was he located?

A. He was located on the forward corner of the No. 15 barge.

Q. Would he be on the forward corner of the trailing or aftermost barge?

A. Yes, sir.

Q. Was he on the deck or was he on top of the lumber?

A. On the deck, sir.

Q. Incidentally, how high would you estimate the lumber was [81] stacked on these two barges?

A. Well, I wouldn't—it must have been anyway from ten to fourteen feet, sir.

Q. Was that true on both barges or just on one barge?

A. Well, I think both were the same, approximately the same height.

Q. Will you state whether or not lumber was

(Testimony of Ethon C. McLaughlin.)

stacked or loaded all over the barge or just at one end or one side?

A. No, sir, it started from a point about I should say ten feet from the extreme end, on both ends like that. In other words, they had make much room on each end of the barge.

Q. And out to the sides, how close was it to the sides?

A. Well, I think it was right up against the sides straight up. I'm not sure, sir.

Q. As you went to the stern did you notice whether there were any lines attached between the leading barge and the trailing barge, what might be known as coupling lines?

A. Yes, sir, they was tied together.

Q. And how close together were they?

A. Well, I couldn't say exactly, but I should think anywhere from three to six feet.

Q. Captain, when you first arrived on the stern of the vessel and looked over the rail as you described, were you able to determine whether the barge was actually in [82] contact with either the rudder or the propeller?

A. No, sir, I couldn't.

Q. Why not?

A. Because the lumber was right against the ship and I couldn't—it was impossible to see anything. You couldn't see the side of the barge or anything, sir.

Q. Now, what was done with the barge after the tug came around and started to pull it out?

(Testimony of Ethon C. McLaughlin.)

A. Well, the tug got way on the barge and started to pull it. It relieved it from the side of the ship, and as it moved away enough room for the lumber to move, the first pile, the very top extreme edge, fell down between the ship in the water, and as she came out more and more you could see the barge were listing then, and she keep on listing more and more and more lumber would be dropping as she go along, and the barge took a—towards the forward end of the ship on the beach and beached it there.

Q. Describe what you did as far as checking for damage at the stern of the ship.

A. After she left, at that time the boatswain was back aft there and he automatically went and got a—what we call a stepladder. It's a straight ladder, about twelve to fifteen feet it was. However, he rigged that over the side, lashed it against the rail, the top ring of [83] the rail—

Q. Where, with reference to the stern?

A. Right over the propeller and in the midship where these two lines were for the warning board. It was right in between there, and when he made that fast, why it was all ready, so I went down and looked at the propeller. I cast my eye right on it the first thing because that's what I thought she was against, the rudder.

The Court: The what?

A. The rudder, sir, of the ship.

The Court: You thought what was against the rudder?

(Testimony of Ethon C. McLaughlin.)

A. The barge, if it come in contact. So I got down there and I saw chips of wood on the propeller and one small nick that was out of the water in that position on the propeller.

Q. (By Mr. Howard): That was on one blade?

A. On one blade, yes, and I came up and then——

Q. Excuse me, Captain. Was the propeller turning at that time? A. No, sir.

Q. By the jacking gear or otherwise?

A. Not at that time when I went down there, sir.

Q. Now, what did you observe at that time as far as the condition of the propeller warning board that had been [84] hung over the side of the ship on the offshore side?

A. When the barge moved out the after line that was holding up this warning pole, the one painted red and white, and the wire that was connected to this watertight—or not watertight but marine type bulb that flashed, those broke. It was caught in the end of the lumber, and when she pull away it broke those two ends.

Q. Were you present and actually saw that happen?

A. I was present at that moment, sir, looking right there.

Q. In other words, you saw the line break on the propeller warning board? A. Yes, sir.

Q. Was there any other damage to the propeller warning board?

(Testimony of Ethon C. McLaughlin.)

A. No, sir, not that I remember. The other end was hanging in the water then, and the wire that connected, that was broken.

Q. Was it still secured by one end of the lines?

A. Yes, sir.

Q. To the rail of the ship? A. Yes, sir.

Q. And how about the electric light cord that supplied the electricity to the marine type light, flashing red light?

A. Well, I pulled that on deck, pulled that right up on deck and throwed it down, and then I had to keep on [85] moving to——

Q. Why?

A. The sparks from the end of it was jumping all around me, so I jumped out of the way.

Q. What did you do to correct that situation?

A. Well, I went around then and undo the plug and took the plug out of the receptacle.

Q. And where is that receptacle again, please?

A. On the very aft end of the ship, sir, on the extreme end.

Q. Now, while this barge was under the stern of the Cotton State did you ever observe any persons on the lumber on top of the barge E-15?

A. No, sir, I did not.

Q. Or at the aftermost end, the stern end of the barge? A. No, sir.

Q. Will you state, Captain, whether or not you observed any members of the deck department of the Cotton State on the deck of that vessel as you

(Testimony of Ethon C. McLaughlin.)

walked aft by way of your cabin to examine the stern area?

A. Yes, sir. I had ordered the boatswain to get one man to take the stern line for the barge, and——

Q. And what did you observe?

A. And that man was standing on the deck around the number four hatch when I went aft.

Q. All right. Now referring to Exhibit 4, would you put a [86] mark on there and identify it as “E” as the point where you observed this other man from the crew of the Cotton State?

A. Well, this is the approximate position.

Q. Approximately? A. Yes.

(Witness marks on Ex. 4.)

Q. Would it be correct to say that he was aft of the midship house?

A. Oh, yes, sir, on the main deck.

The Court: At this point we will take a short, very brief recess.

(Short recess.)

The Court: You may proceed.

Q. (By Mr. Howard): Captain, after making this examination of the stern area, the propeller and rudder of the ship, by means of the stepladder which you have described, did you thereafter make a further examination or inspection of the stern area from the dock? A. Yes, sir.

Q. And when was that with reference to the other inspection?

(Testimony of Ethon C. McLaughlin.)

A. Well, it wasn't so very long. We inspected the propeller and then of course we had to go forward, the captain, the engineer and I, and we go down the gangway and walk aft.

Q. That is the captain, the chief engineer and yourself? [87] A. Yes, sir.

Q. You went down on the dock?

A. Down on the dock, yes, sir.

Q. And walked aft? A. Yes, sir.

Q. And what could you see from the end of the dock as far as the condition of the propeller is concerned?

A. Well, at that time the engineer had it moving, so——

The Court: No, just answer the question.

A. We observed the damage in three blades of the propeller, sir.

Q. (By Mr. Howard): And where was the damage in the blades of the propeller?

A. Well, I'm not sure whether it was the driving edge or the aft edge and so on and so forth, but——

Q. Was it towards the tips of the propeller blades? A. Yes, sir.

Q. Was the propeller turning in the jacking gear at that time? A. Yes, sir.

Q. If I understand you correctly it had not been turning, it was not turning at the time you made your examination from the stepladder?

A. No, sir.

Q. And therefore you were only able to see the tip of one [88] blade at that time?

(Testimony of Ethon C. McLaughlin.)

A. Yes, sir.

Q. From the stepladder? A. Yes, sir.

Q. But when you got down on the dock the propeller was turning in the jacking gear then?

A. Yes, sir.

Q. Now referring you again, Captain, to Exhibit 4, did you mark on there Point E to identify the other deck hand from the ship who was available aft of the midship house? A. Yes, sir.

Q. And do you know who that man was?

A. Yes, sir.

Q. Who was he?

A. Mr. Fulmer there (indicating).

Q. What position did he hold on the ship?

A. A deck maintenance man, or a utility man.

Q. All right. Now, again referring you to Exhibit 4, can you identify on there by the letter "F" the position at the stern of the vessel where the warning boards and flashing light were in place as you have described them?

(Witness marks on Ex. 4.)

A. Yes, sir.

Q. When you walked aft by way of your cabin, will you state whether you observed whether the barges were still [89] coupled together at that time?

A. Yes, sir.

Q. And there was no line between the ship and the barge after of the midship house?

A. No, sir.

Q. On Exhibit 4, Captain, would you identify by

(Testimony of Ethon C. McLaughlin.)

“15,” the number 15, the position of that barge under the stern of the vessel as you have outlined it by lines?

A. Repeat that question again, sir.

Q. On Exhibit 4 would you please put the identifying mark “15” to show the point where the trailing barge was under the stern of the ship?

A. All right, sir.

(Witness marks on Ex. 4.)

A. Yes, sir.

Mr. Howard: That completes the direct examination, your Honor.

The Court: You may cross-examine.

Cross-Examination

By Mr. Biele:

Q. Mr. McLaughlin, do you have a pilot's license for Puget Sound? A. No, sir.

Q. Prior to this occasion had you ever been in the port of [90] Everett to load lumber?

A. No, sir.

Q. Prior to this occasion had you ever taken two scows alongside at one time to load lumber?

A. Not lumber scows; small scows.

Q. You were the chief mate on the vessel, were you not? A. Yes, sir.

Q. What generally are the duties of the chief mate?

A. With regards to cargo, sir, or lumber or anything?

(Testimony of Ethon C. McLaughlin.)

Q. With regard to cargo, yes.

A. Well, when we get to the dock we tie up and then I proceeds to my room and await for whoever representing the cargo or the lumber or whatever it may be, and he comes in and presents me with what we call a preloading plan. It's the outlining what cargo is going forward or aft or such things as that, whether it has to be secure or whether it's readily able to go on deck or whatever the case may be. He hands me that, and then——

Q. Do you determine then where the cargo is to go to your satisfaction?

A. Well, to the master's satisfaction. It has to go up for his O.K. on the cargo, sir.

Q. Do you approve it also?

A. Well, I approve it after he do, yes, sir.

Q. Would you load cargo that you didn't think was [91] satisfactorily stowed?

A. If it wasn't satisfactorily stowed?

Q. Yes.

A. No, sir. I'd call it to the attention of the master.

Q. Did you have the responsibility to see that the cargo was taken aboard and stowed?

A. Yes, sir.

Q. Did you have the responsibility to see that this cargo on this occasion was taken aboard and stowed?

A. No, sir.

Q. Was this occasion different than your other occasions?

A. Well, I take the responsibility after it's

(Testimony of Ethon C. McLaughlin.)

raised over the rail, sir. Then it becomes my responsibility, sir, from the ship gear to the hatches.

Q. Is one of your responsibilities the safety of your ship at all times? A. Oh, yes, sir.

Q. Is it also one of your responsibilities to watch out and protect the ships that may be passing in the vicinity of the Cotton State?

A. No, sir.

Q. Do you ignore them? A. Sir?

Q. Do you ignore them?

A. Oh, no, I do not ignore them. If a ship—if a barge [92] under tow or under their own power comes alongside the ship, they calls our attention by blowing a few blasts to know that there's someone there. We're probably paying attention to something else, such as—well, maybe you're down in the hold.

Q. Well, once some scows or a tug approach your ship, do you take it as part of your duty to protect those scows and ships? A. No, sir.

Q. You do not have anything to do with protecting those ships whatsoever?

A. Well, it's the customary rule for the ship to furnish line for barges, and we give them the line and make them fast, wherever they're supposed to be.

Q. If you were to see scows coming alongside your ship in apparent danger, would you consider that part of your mate's responsibility to see that they didn't damage your ship?

A. It depends on whether this barge would be

(Testimony of Ethon C. McLaughlin.)

under tow or whether it would be drifting toward the ship.

Q. Well, if the barge was drifting, would you consider it part of your duty to take affirmative action on the ship to do something about it?

A. All we could do is call the—I could let the other men know that it was coming there or anything like that, but [93] all we could do would be to put a fender there, if one was handy.

Q. Now, you say you could call the other men about that. Would you call the engineers?

A. Yes, we could call the engineer, yes, sir.

Q. Would you call the other mates on the ship?

A. Yes, you could. The one on watch would be the one.

Q. Could you call the captain?

A. Well, there wouldn't be any reason to call him unless something happened.

Q. Now, could you call it to the attention of some ship that was drifting in towards the ship?

A. No, I would call the attention to the ship itself.

Q. You would call it to the attention of the engineers, perhaps?

A. No, sir, to the ship.

Q. To the ship?

A. On watch, whoever is on watch.

Q. That is, those on watch on your ship?

A. It would be the one on watch on my ship. In fact, he would be—as the mate I'm not on deck all the time, particularly in the nighttime. In the day-

(Testimony of Ethon C. McLaughlin.)

time, yes, but it would be the duty of the mate on watch at night to call attention of the approaching vessel that was coming in, particularly if they was under their own [94] power or under power by being towed, you would call attention to them to keep clear automatically.

Q. Now, on this occasion did you call it to the attention of the watch mate on your ship?

A. No, sir. I didn't see the accident. I saw it when she was underneath the counter.

Q. Did you call it to the attention of those on the tug or the scows?

A. No, sir. I didn't see it happen.

Q. Now, as I understand it you were one deck above the main deck? A. Yes, sir.

Q. And how high above the main deck would that be?

A. Well, from six to eight feet, sir. Oh, over six feet anyway. It has to be high enough for a man to walk, say eight to ten feet.

Q. Were you above the top of the lumber on the scows? A. Yes, sir.

Q. How high above the lumber on the scows do you think your eyes were?

A. Well—oh, my eyes. I'm six feet. I'd say ten feet, sir, somewhere around there.

Q. You were at least ten feet above the tops of the lumber scows, the tops of the lumber on the scows? A. Yes. [95]

Q. That would give you a birdseye view of everything that went on, didn't it?

(Testimony of Ethon C. McLaughlin.)

A. No, sir, I could only see the top of these lumber—these two sections of lumber.

Q. You could see the tops? A. Yes, sir.

Q. Now, as the scows came alongside and before they came to that point——

Mr. Biele: If I may see Exhibit 4.

The Court: That will be done.

(Libelant's Exhibit No. 4 was handed to Mr. Biele.)

Q. (By Mr. Biele): As the scows came up and hadn't come alongside the ship yet, did you observe them?

A. Yes. When I got up on the deck sir, talking to that man I observed, I could see the forward end of the No. 25 barge.

Q. Did you see two scows?

A. You could see the two, sir, one behind the other.

Q. Did they appear to be in line?

A. Yes, sir.

Q. Did the tug appear to have them under control?

A. Not at that time. When I first see them she was just sitting on the outside of the outside corner, and then after the man talked to them about moving she shift [96] around and——

Q. That's not responsive to my question.

A. Well, they was not under control, sir.

Q. Well, now, did you have a searchlight on the Cotton State on the starboard side?

(Testimony of Ethon C. McLaughlin.)

A. No, sir.

Q. Nothing on the wing of the bridge?

A. No, sir. I had it in my room.

Q. A searchlight?

A. Oh, a searchlight. I think there's a cargo light there, sir.

Q. Where was that located?

A. That's on the forward corner of the bridge.

Q. Was that illuminated at this time?

A. I'm not absolutely sure, sir, but I think it was.

Q. Were there lights in the rigging?

A. Yes, all the lights on the mast was light, sir.

Q. As a matter of fact there was plenty of illumination that night, wasn't there?

A. Yes, sir.

Q. As a matter of fact there was still some daylight even, wasn't there?

A. No, it wasn't really, sir. It was the light from the lights around the ship that made you see everything.

Q. Well, now, are you sure it wasn't daylight? [97]

A. Yes, sir, I'm sure.

The Court: What time of day do you think it was when those barges with that tugboat towing them came alongside?

A. Around 6:00 o'clock, sir.

The Court: In the evening?

A. Yes, sir, or after.

Q. (By Mr. Biele): Mr. McLaughlin, do you re-

(Testimony of Ethon C. McLaughlin.)

member your discovery deposition being taken in Vancouver, Washington, some time ago?

A. Yes, sir.

Q. And that was aboard the ship, was it not?

A. Yes, sir.

Q. Do you remember being put under oath at that time? A. Yes, sir.

Q. And do you recall testifying to questions and answers on that occasion? A. Yes, sir.

Q. Do you remember——

The Clerk: What page are you on?

Mr. Biele: Page 117.

(A copy of the deposition was handed to the Court.)

Q. (By Mr. Biele): Do you recall being asked the following questions and giving the following answers: [98]

“Q. In January what was the condition of the daylight? A. Oh, it was day still.

“Q. It was still daylight?

“A. Yes. It was cloudy that day. I mean the sun wasn't shining.

“Q. At the time of the accident it was light outside? A. Oh, yes.

“Q. Or was it dark?

“A. It was light; light enough you could see. It was getting dusk, you know.

“Q. Did you have to have any lights, or were you using any lights for this procedure of pulling these scows alongside? A. No, sir.”

Do you remember giving those answers in re-

(Testimony of Ethon C. McLaughlin.)

sponse to those questions? A. Yes, sir.

Q. Now, Mr. McLaughlin, in response to your Counsel's question you indicated that there were two warning boards or two warning systems aboard the Cotton State on this night, did you not?

A. Yes, sir.

Q. One of those you described as a barber [99] pole? A. Yes, sir.

Q. And that was the one that was hung over the side of the Cotton State? A. Yes, sir.

Q. You also described one as a warning board with some sort of lettering on it? A. Yes, sir.

Q. Are you sure that both of those were on the ship at that time?

A. You mean the one with the lettering on it, sir?

Q. Yes.

A. Yes, sir. It's a permanent fixture.

Q. Again do you recall giving your deposition in Vancouver and giving—this is Page 132. Do you remember being asked these questions and giving these answers—

The Court: At what page?

Mr. Biele: 132, your Honor.

Q. (By Mr. Biele reading):

“Q. Are there any other signs on the ship warning of the propeller, or is that barber pole all you have? A. That is our warning signal.

“Q. There is no sign saying—

“A. That is a red light; no sign.

“Q. —‘Beware of propeller’ or is there [100] any lettering on the barber pole itself?

(Testimony of Ethon C. McLaughlin.)

“A. No, sir; just white and red, white and red.”

Do you remember giving those answers at Vancouver? A. Yes, sir, I do.

Q. At that time you were aboard the ship, were you not? A. That's right, sir.

Q. And you described only the barber pole?

A. Yes.

Q. You didn't describe this other warning board?

A. No, I don't think I did. That's permanent there, was the reason, probably.

Q. Now, Mr. McLaughlin, you have described a conversation with some gentleman on the ship.

A. Yes, sir.

Q. Could you describe this gentleman to us?

A. Well, he was quite a big man, and, well, I should say he was around the fifties and he wore a Mackinaw coat. That's all I can tell you.

Q. Did he identify himself to you?

A. No, sir, he didn't.

Q. And did you ask for his identification?

A. No, sir, I did not.

Q. Did he say that he was from the Tow Boat Company?

A. I made my own decision about that. I thought he was [101] from the Lumber Company, sir.

Q. You assumed he was from whom?

A. You know, the man representing the lumber.

Q. Now, who were the stevedores on this occasion?

A. Well, offhand I don't know, but there was no stevedore yet, sir.

(Testimony of Ethon C. McLaughlin.)

Q. Well, who was the supercargo on this occasion?

A. I wouldn't know that offhand either, but he was not there. You mean the State Marine supercargo, sir?

Q. Well, maybe I better ask you, did States Marine have a supercargo on the ship?

A. The next morning, yes, I think.

Q. Were there any other supercargoes on the ship?

A. Well, it was what they call the night man.

Q. The night man for whom?

A. Well, I didn't ask him who he was. I met him later on on the after deck.

Q. And this was after this had happened?

A. Yes, this was after the examination and so on and so forth, and I asked him who he is and he say, "I'm the night man." He say, "I relieved the day man," and that was all the conversation between us.

Q. How long did the night man stay on the ship?

A. Well, I went off watch then, sir. He probably stayed on when the regular watch—you know, if they change [102] the shift at 12:00 o'clock, why he probably went off then.

Q. What time was it that you spoke to this gentleman?

A. Well, I couldn't tell you what time, sir. It was sometime after all of this commotion about the examination and this and that, looking at the propeller and so forth. It was sometime after that.

(Testimony of Ethon C. McLaughlin.)

Q. Did the captain or anyone suggest to you that his identity should be ascertained?

A. No, sir, no one.

Q. Do you know who was the consignee of the cargo of lumber that was involved on this occasion?

A. You mean the receiver of the cargo, sir?

Q. Yes.

A. The Army, I was made to understand, sir.

Q. Is it not a practice for the Army to have their own supercargoes aboard ships when their cargo is loaded?

A. No, sir, it's not—in other ports on the Army base, wherever it is, the Army base, you go to their dock and they have their representative.

Q. Do you mean they have a representative aboard the ship?

A. Not there as I know. I don't know if they had anyone at that particular time, but like in Seattle in the Army place or the Navy place or in 'Frisco, wherever there's an Army installation, they has their representative [103] to come aboard, sir.

Q. You mean somebody from the Army comes aboard the ship?

A. Yes, sir, representing the Army.

Q. When their cargo is to be taken aboard?

A. Yes. On private docks, I mean Army installation docks.

Q. Do they do that whenever cargo is taken aboard?

A. It's customary whenever it is taken aboard at Army docks.

(Testimony of Ethon C. McLaughlin.)

Q. Did you see anybody from the Army on the vessel at this time?

A. No, sir, not as I know. There wasn't no one speak to me or I didn't know there was anyone representing the Army.

Q. Did you see a day man before you saw this night man?

A. I only saw one man, and that's the man I speak to, and he asked me for a line to tie the barge before that.

Q. That was the night man you described?

A. Well, he should have been the day man.

The Court: Ask him, "Was it not?" "Is it not?"

Q. (By Mr. Biele): Was that the night man?

A. No, that wasn't the same man, sir.

Q. Oh, was it the day man that you saw?

A. You could say it was the day man.

Q. Was the day man relieved by a night man?

A. The night man—the man that told me that, "I'm the [104] night man," he relieved the day man.

Q. Well, then this conversation that you had before the scows were tied up was with the day man?

A. It should have been the day man, yes, sir.

Q. And your conversation afterwards when you assumed that he was from the Lumber Company was with the night man?

A. Yes, sir.

Q. That was another gentleman?

A. That was a different man, that's right, sir.

Q. Then is it a fair statement that you have

(Testimony of Ethon C. McLaughlin.)

no idea whatsoever who this gentleman was that requested the lines from you?

A. May I have that question again, sir?

Mr. Biele: Will the reporter read the question?

The Court: That will be done.

(The reporter read the last question.)

A. Yes, sir, I mean who he represent, I really don't know who.

Q. (By Mr. Biele): Mr. McLaughlin, the fact of the matter is, is it not, that you don't know when the warning signs were put out on this occasion?

A. No, sir, not the moment it was put out.

Q. You don't know who put them out?

A. Yes, sir, I do.

Q. Do you know whether they were out when the tug was [105] abreast of the stern of the vessel?

A. No, sir.

Q. Your only observation is that they were out later on?

A. No, sir, when I got back aft there.

Q. When you were back aft? A. Yes, sir.

Q. But whether they had been put out before the tug came alongside or while the tug was alongside you do not know?

A. I do not know the time. I know approximately when they should have been put out.

Q. Mr. McLaughlin, did you give any thought to the fact that the propeller might have been turning over on the Cotton State?

(Testimony of Ethon C. McLaughlin.)

A. No, sir, to tell you the truth I didn't give it a bit of thought. I was concerned with the rudder.

Q. You didn't give it a bit of thought?

A. About the turning of the propeller, because we had just got in there and maneuvering getting to the dock and coming from Seattle I didn't think about the propeller being moving at that time.

Q. Do you know how long the propeller was in contact with the scow?

A. No, sir, I do not know.

Q. When you were back aft after getting your flashlight did you observe the scows moving in any way? [106]

A. No, sir.

The Court: Do you know, and state if you do, was the steamship Cotton State in motion at the time the barge was being moved alongside, or was the Cotton State already tied up stationary to the dock?

A. Yes, sir.

The Court: The latter?

(Witness nods his head.)

The Court: I asked you an alternative question and it probably was not very clear. Were you aware of the moment when the barge contacted whatever was contacted as a part of the ship Cotton State, were you aware of the moment of contact? Yes or no, please, if you understand the question. If you do not understand the question I will——

A. Yes, sir.

The Court: At that moment was the ship tied

(Testimony of Ethon C. McLaughlin.)

up already or was it still in the act of being tied up to the dock?

A. It was already tied up, sir.

The Court: How long had it been tied up, if you know?

A. I really don't know that, sir, the minutes.

The Court: Do you feel you have a positive conviction as to whether or not the Cotton State [107] was still in motion and not yet come to rest as a docked ship?

A. She had come to rest and was securely tied up, sir. No motion, no movement one way or the other.

The Court: What is the fact, if you know it, with reference to the tug and barges being in motion in connection with their coming alongside the ship for unloading purposes and with reference to the becoming stationary and tied up at the dock on the part of the ship? Which came to rest first in their respective movements, if you know?

A. When I got back aft it was at a standstill. I did not see the barge nor the tug approach the ship. I was up forward tying the ship up and when I completed tying the ship up I walked back aft, and when I got on top of the house and meet this gentleman, I then saw the barge and the tug.

The Court: At that moment——

A. At that moment.

The Court: ——state if you know whether the tug and the barges were in motion.

A. No, sir, they was standing still, waiting.

(Testimony of Ethon C. McLaughlin.)

The Court: At that moment——

A. At that moment, sir. [108]

The Court: At that moment had any contact occurred between the E-15 and the stern of the vessel or the propeller of the Cotton State?

A. No, sir.

The Court: Then is it your statement or not your statement that at the time of the contacting of the E-15 with the propeller of the Cotton State both craft, that is the Cotton State on the one hand and the tug and tow on the other, were already stationary, stopped in the water, is that right?

A. I didn't—I don't know the time of the contact with the barge and the stern of the ship.

The Court: You may proceed.

A. The after one, No. 15.

The Court: What the Court wishes to know from you if you observed it finally is, and I take it that you did not in view of what you have said, is whether or not the navigation of the two vessels had already been completed and the two vessels had already come to a stop in the water. That is what I would like to know. If you do not know that, then you should not answer. If you do know that, I should like you to answer.

A. At that moment the tug was pushed further aft at that moment, sir. When I looked, at that moment the tug was not under the boat. She had moved aft. [109]

The Court: I did not ask you where she was. I asked you was the tug and either one of those

(Testimony of Ethon C. McLaughlin.)

barges or either one of them in motion before this contact took place.

A. Yes, sir.

The Court: Do you feel your observation was clearly enough made that you know that fact?

A. Yes, sir, I think so.

The Court: You may inquire.

Q. (By Mr. Biele): Mr. McLaughlin, at the time that this contact was made the line from the tug had been cast off the scow, had it not?

A. Which contact, sir?

Q. The contact with the propeller.

A. When I saw the barge aft and was walking on my way aft to get to the barge——

Q. Yes, the line between the tug and the scow had been taken aboard the tug?

A. The man on the tug was just giving him a line from the barge or taking one at that——

Q. And you had a line from the forward scow to the ship, did you not?

A. The forward end, yes, sir.

Q. You had that line?

A. That one was made fast. [110]

Q. And that line was made fast to which part of the forward scow?

A. The outside corner forward.

Q. And that was the place where the tug had been towing from, was it not? A. Yes.

Q. So in effect your line had been substituted for the tug's line, had it not?

A. Well, if you want to call it that, sir.

(Testimony of Ethon C. McLaughlin.)

Q. And that was at the time when this thing happened, your line was on the ship, on the scows, and substituted for the tug's line?

A. I don't know what time it happened. I saw the tug after—I mean the barge after she was there. I didn't saw the contact, sir.

Q. Now, did you make any protest or any comment whatsoever when the request was made by the man whom you have described from the shore as to how the scows were to be tied up? A. No, sir.

Q. Did you acquiesce in the way they were tied up? A. What, sir?

Q. Did you agree with the way they were to be tied up?

A. Well, for the first line that was perfectly all right, sir. [111]

Q. You saw nothing the matter with it?

A. Well, the only thing the matter with it, she couldn't be operated from there because she was in the midship section of the ship.

Q. Now, you participated in that, though, did you not?

A. Yes, I helped make fast the line, pulled in the slack.

Q. And you stood right there while it was being done? A. Yes.

Q. With this gentleman alongside of you?

A. He was—yes, aft, of me. The boatswain was with me.

Q. Now, at that time were you able to converse with the man on the tug if you wanted to?

(Testimony of Ethon C. McLaughlin.)

A. Sure, I could holler to him if I wanted to.

Q. Did you see any reason to?

A. No, sir, I did not at that time.

Q. Were you thinking about the danger of propeller damage at that time?

A. No, sir. I didn't see the contact yet.

Q. It hadn't entered your mind?

A. No, it didn't enter my mind. I didn't see the barge underneath the stern or anything.

Q. Had anybody from the engine room told you they were going to start up the propeller at that time?

A. There's no engine room on deck, sir. It would be impossible [112]

Q. Had you been told that the propeller was going to be started up at that time?

A. They never do tell me, sir.

Q. They never tell you? A. No, sir.

Q. Then you had been——

A. Not when you come in like that.

Q. You hadn't been told that the propeller was going to be started up?

A. No. When the ship is in port loading cargo, when she's prepared to go out, the engineer call to the deck for the man on watch and get his permission to turn the propeller over.

Q. Did you assume that the propeller was going to be turned over?

A. Well, we always—I know it's the regular procedure that they turn it over. That's all I know, sir.

(Testimony of Ethon C. McLaughlin.)

Q. You knew the propeller was going to be turned over?

A. Well, it's the regular procedure. I think it should be.

Q. Did you tell that to this gentleman from the shore? A. Of course not.

Q. Did you tell that to those on the tug or the scows?

A. I had no contact with them whatsoever, not a word.

Q. You didn't open your mouth to tell them that the propeller was going to be turned over? [113]

A. Not a word one way or the other.

Q. Isn't it a fact that there was fourteen inches of one of those blades missing?

A. One tip, yes, sir, was missing. No. 4 I think it was, I'm not sure.

Q. Yes, and there was fourteen inches of that missing? A. I'm not sure of that, sir.

Mr. Howard: Now, your Honor, I would like to point out that the damages have been stipulated. Mr. Biele knows very well that we have stipulated, we have conceded that one blade of this propeller was damaged on a prior occasion. The damage had been unrepaired. We are not claiming for any of that damage. We have agreed on the damage to the other three blades which occurred in this accident. I can see no relevancy to damage to the fourth blade. I object to going into this.

The Court: Just state on what theory you seek to ask this question.

(Testimony of Ethon C. McLaughlin.)

Mr. Biele: Your Honor, the fact that fourteen inches of this blade were missing was a rather unusual condition on this ship, and that if they try to hold us responsible for knowledge and that this propeller was exposed and turning and all of that and one of these blades had fourteen inches missing, I think that there was much lacking in what they told us, and I think that [114] this gentleman should have told that to those on the ship, that fourteen inches of this blade was missing, because they contend we should have seen it, we should have looked at it, but the fact of the matter is that one of these blades was half——

The Court: Do not argue the case, just state simply on what theory you seek to ask for this information.

Mr. Biele: Lack of general prudence in not notifying those on the tug of this unusual condition in the propeller area, your Honor.

Mr. Howard: Well, your Honor, Counsel has gone into that. Damage to one of the blades has no bearing on that whatsoever.

The Court: The objection is overruled. For the limited purpose mentioned it may be inquired of.

Q. (By Mr. Biele): Do you have the question in mind, Mr. McLaughlin?

A. The last question, sir?

Q. Yes. A. No, sir.

Mr. Biele: May we have the last question, your Honor?

The Court: Yes. Read it, Mr. Reporter.

(Testimony of Ethon C. McLaughlin.)

(The reporter read the question as [115] follows: "Q. Yes, and there was fourteen inches of that missing"?)

A. On No. 4 blade, I don't know the exact measurement, sir, but there was the tip missing.

Q. (By Mr. Biele): Did you notify the man from the shore that the tip was missing on No. 4 blade?

A. You mean the one that I think was representing——

Q. Yes. A. No, sir, I did not.

Q. Did you call that to the attention of those on the scows or the tug? A. No, sir.

Q. Mr. McLaughlin, you testified that there were two other men on deck besides yourself at this time from the ship, did you not? A. Yes, sir.

Q. Was that in addition to this man from the shore? A. He made the fourth man.

Q. He made the fourth man?

A. That's right.

The Court: At this time we will take a recess until 2:00 o'clock.

(Thereupon, at 12:00 o'clock noon a recess herein was taken until 2:00 o'clock p.m.) [116]

November 26, 1958—2:05 o'Clock P.M.

(All parties present as before.)

The Court: Will the witness now resume the stand?

ETHON C. McLAUGHLIN

resumed the stand.

The Court: You may proceed whenever Counsel is ready.

Mr. Biele: Thank you, your Honor.

Cross-Examination

(Continued)

By Mr. Biele:

Q. Mr. McLaughlin, when you went back aft on the ship to observe the scow, is it your testimony that somebody was back there aft at that time on the after deck?

A. On the main deck, sir.

Q. On the main deck? A. Yes.

Q. The after part? A. Yes, sir.

Q. Do you know who he was? A. Yes, sir.

Q. Mr. McLaughlin, again referring to your discovery [117] deposition, at Page 109, Counsel, do you remember being asked these questions and giving these answers at Vancouver:

“Q. Was there anyone on the after deck of the ship that you could observe when you went back aft for the first time?

“A. No, sir; no one whatsoever was there.

“Q. It was completely——

“A. Yes, sir; no one was back there at all.”

Do you remember giving those answers to those questions?

A. Well, I probably did. I just can't remember it.

(Testimony of Ethon C. McLaughlin.)

Q. Mr. McLaughlin, you did, as I understand it, go to get a flashlight in your room?

A. Yes.

Q. Is it also true that the boatswain had a flashlight available?

A. Yes. He said to me, he says, "Take mine."

Q. Was he standing in your vicinity?

A. Yes; he was right in my vicinity over the outside of the railing.

Q. Did he offer you his flashlight?

A. He says, "Take mine."

Q. But you didn't do that?

A. No; I didn't.

Q. When these scows were being tied up by you and the mate, [118] or by you and the boatswain, in what direction were you looking?

A. I was facing forward.

Q. That would put your back to where the scows were? A. Yes, sir.

Q. And to the propeller? A. Yes, sir.

Q. So that you couldn't see back aft because your back was turned to it as the scows were being tied up? A. Yes, sir.

The Court: Did anyone working for the scow or speaking for the interests of the scow ever assert to you that the damage was made by the propeller and that the propeller was started in motion after the tug and tow were brought to rest?

A. No, sir; no one.

The Court: You may inquire.

Q. (By Mr. Biele): During the time that these scows were brought alongside and until the line

(Testimony of Ethon C. McLaughlin.)

was secured by you and the boatswain in substitution for the tug's line, did you make any protest or any objection to the way in which it was being done? A. No, sir.

Q. You stood mute? A. Sir? [119]

Q. You stood mute? You didn't say anything?

A. No.

Q. This line that was substituted for the tow-line when tightened as you have described would keep the forward scow in towards the ship, would it not, if it were tightened? A. Yes.

Q. And if it were slacked off it would allow the scows to drift astern or out from the ship, would it not? A. Yes; it would have if it were.

Q. Now, did you have anyone stationed back aft as a lookout at the time these scows were brought alongside?

A. No. I didn't see these at the time they were brought alongside.

Q. Did you have anyone stationed back aft——

The Court: Did you hear Counsel?

Mr. Biele: Excuse me, your Honor.

The Court: Mr. Witness, did you hear Counsel's last question?

A. Yes. I didn't think he finished it.

Mr. Biele: I'll rephrase my question, your Honor.

The Court: Very well.

Q. (By Mr. Biele): Mr. McLaughlin, what kind of communication do you have from the bridge to those on watch in [120] the engine room?

(Testimony of Ethon C. McLaughlin.)

A. From the bridge telephone, and also a speaking tube.

Q. From the bridge? A. The bridge.

Q. Do you have a telephone from the stern area of the ship? A. Yes, sir.

Q. In the area of the propeller?

A. Yes; to the bridge.

Q. Were those in working condition on this night? A. Yes, sir; if I remember right.

Q. How long do you think it would have taken you to call the engine room when you saw the scow up against the side of the ship as you have described?

A. It wouldn't be a matter of but a few minutes. A few seconds, rather, not minutes.

Q. You could do it in a few seconds?

A. Yes; something like that. You could call up as soon as you saw it.

Q. Now, as the chief mate, do you have the authority to call up the engine room and tell them to stop the propeller if it's rotating and something is menacing it?

A. Yes; if I saw it, I could do that.

Q. You didn't do that on this occasion?

A. When I got aft the barge was against the hull of the ship, the lumber, and I didn't call up. I didn't think [121] of it.

Q. You didn't think of calling up the engine room?

A. No. I was thinking about the rudder.

(Testimony of Ethon C. McLaughlin.)

Q. Well, as I recall your testimony from before luncheon you indicated that you didn't think of the propeller turning, you thought of the rudder?

A. That's quite true, sir.

Q. Did you ever warn those on the tug or the scows that the rudder might be damaged?

A. No. I didn't see it before she went there. She was already there, sir, when I got aft.

Q. Did you do that when you tied up the scows and substituted your line for the line on the tug?

A. No. The barge wasn't underneath there then. When I got there I put the first lines out on the side.

Q. Did you at any time tell those on the tug that the rudder might be in danger?

A. I didn't speak to anyone on the tug or the barge at no time.

Q. At any time?

A. At any time during that tying up or me going aft.

Q. Mr. McLaughlin, when you went aft, did you leave the boatswain at this line that was substituted for the tug's line?

A. When we were tied up? [122]

Q. Yes.

A. That was the position he was in when I left.

Q. And you left him there? A. Yes.

Q. Did you give him any orders at that time?

A. No, sir.

Q. You left him there to see the line?

(Testimony of Ethon C. McLaughlin.)

A. Well, he was completing making it fast, sir, at that time.

Q. Did you have a full crew aboard the Cotton State on this night? A. Yes, sir.

Q. Mr. McLaughlin, did this unidentified person that you have described ever touch a line that you had led from the ship to the scows?

A. The unidentified man that I speak to afterward that say he was——

Q. Did he ever handle the lines?

A. No, sir. This was a long time after we finished that I spoke to him.

Q. This unidentified man had nothing to do with the placing of the lines, the physical placing of the lines?

A. I didn't see him there at the time. He came later, and this was after everything was over.

Q. You saw him after it was tied up? [123]

A. This man told me he was the night man.

Q. But I'm referring now to the time when you substituted your line for the tug's line. Did he handle a line at that time?

A. No; not at that time, sir.

Q. Well, then, would it be correct that the only persons that handled the line on the ship were you and the boatswain?

A. On the ship, yes, sir.

Q. After the substituted line was led from the ship to the scow, did you observe what the tug did after it took in its line? A. No, sir.

Q. So from the time that the tug's line was

(Testimony of Ethon C. McLaughlin.)

taken aboard the tug until you got back aft you don't know what the tug did?

Mr. Howard: I object to that question because there is no testimony in this case, your Honor, that the tug took in its line, nor is there any testimony in this case that there was a substitution of lines.

The Court: In view of the form of the question the objection is sustained with leave to propound a proper question.

Mr. Biele: May I confer with Mr. Crutcher a moment? [124]

The Court: You may do that.

(Brief pause.)

Mr. Biele: I think that's all, your Honor.

The Court: Anything further?

Mr. Howard: Yes; I have some redirect, your Honor. May the witness have Exhibit 1 before him and Exhibit 4?

(The exhibits were handed to the witness.)

Redirect Examination

By Mr. Howard:

Q. Captain, what time did the Cotton State complete its docking operation at the Port Dock, Everett, on the evening of January 10th? And you may refer to the log to check the time on that.

A. Finished with engine at 1835, and when that order goes to the bridge we get—make her fast forward.

(Testimony of Ethon C. McLaughlin.)

Q. And were you then on the bow of the ship?

A. Yes, sir.

Q. The foredeck of the ship 1835 hours?

A. Yes, sir.

Q. That being 6:35 p.m.? A. Yes, sir.

Q. What time did the tug Lea Moe bring the barges along the starboard side of the ship? And you may refer to the [125] log for that if there is an entry concerning it? A. I did not see it.

Mr. Biele: Your Honor, I object to this as not proper redirect.

The Court: Did you not dwell upon the time of day or the incidence of the time of day?

Mr. Biele: Just as to the visibility, your Honor, I think.

The Court: The objection is overruled. The Court might consider striking it if he does not tie this in with the question of visibility.

Q. (By Mr. Howard): Do you have the last question, Mr. McLaughlin?

The Court: It could be read if you do not recall it.

A. Yes, your Honor; I don't recall it.

The Court: Read the last question, Mr. Reporter.

(The reporter read the last question.)

A. Here's "1845, Barge E-15 struck propeller."

The Court: Wait just a minute. He did not ask for that.

A. I know, sir, but I don't—yes, "1840, tug bringing barges of lumber alongside. E-25"—

(Testimony of Ethon C. McLaughlin.)

The Court: In land language what does that mean in time? [126]

A. That means 6:00 o'clock, 6:40, sir.

The Court: 6:40?

A. Yes, sir.

Q. (By Mr. Howard): 6:40 p.m.?

A. P.M., yes.

Q. And what time did the accident happen between the barge E-15 and the propeller? And you may refer to the log. A. 1845, sir.

Q. That would be 6:45 p.m.?

A. 6:45 p.m.

Q. In other words, Captain, at 6:35 p.m. the ship was tied up alongside the dock?

A. Yes, sir.

Q. And according to the log five minutes later the tug brought the two barges alongside the ship?

A. Yes, sir.

Q. And five minutes after that the barge struck the propeller of the ship? A. Yes, sir.

Q. According to the log? A. Yes, sir.

Q. Now, Captain, will you tell us again what your testimony was as to the hour of sunset on January 10th?

A. Well, I said it was daylight at that first testimony, and I will say that I found that I was incorrect at that [127] time, but I was referring to the visibility that I could see then, because I could see the top of the tug away from it and you could see everything around at that time.

Q. Now, Captain, my question was what was the

(Testimony of Ethon C. McLaughlin.)

hour of sunset on January 10, 1957, as you computed it from the Mariner's Almanac?

A. 1629.

Q. That would be 4.29 p.m.?

A. P.M., yes sir.

Q. Or more than two hours before the Cotton State tied up at the dock at Everett?

A. Yes, sir.

Q. Now, Captain, when you left the bow of the ship and walked to this point which you have marked on Exhibit 4 where you met this unidentified man, was the ship stationary at the dock at that time? A. Yes, sir.

Q. Did it move thereafter that evening?

A. No, sir.

Q. In any direction? A. No direction.

Q. To any extent? A. No, sir.

Q. You have testified that on your first observation of the tug and barge, that they were stationary along the [128] starboard side of the ship. Am I correct in that? A. Yes, sir.

Q. Did the tug and barge thereafter move in any direction? A. Yes, sir.

Q. In which direction?

A. First it pushed into the boat, and then after that, back.

Q. And how far back did the tug move the barges?

A. Well, I would say around 30 to 40 feet, sir.

Q. Would that be the distance between Point C and Point B on Exhibit 4? A. Yes, sir.

(Testimony of Ethon C. McLaughlin.)

Q. That's a distance of about 30 to 40 feet?

A. Yes, sir.

Q. Now, Captain, in answer to questions by Mr. Biele you admitted making certain statements at the time your deposition was taken with respect to the type and number of warning boards or devices, warning devices, at the stern of the vessel, referring to Page 132 of the deposition as taken at Vancouver, Washington on March 9, 1957. I would like to read again this question as it was read by Mr. Biele from Page 132.

“Q. —‘Beware of Propeller’ or is there any lettering on the barber pole itself?

“A. No, sir; just white and red, white and red.” [129]

The Court: I do not see that on Page 132.

Mr. Howard: It's about—starting the eighth line from the top, your Honor.

The Court: I see it. I wish Counsel could have some influence on the reporters in communities other than Seattle with the result of their using numbered line paper. It certainly is a great convenience on occasions like this. You may proceed.

Q. (By Mr. Howard): And was that your testimony, Captain? A. Yes.

Q. Is that a correct statement?

A. That was a correct statement.

The Court: Mr. Reporter, will you read what the witness said just a moment ago regarding the answer to the question.

(Testimony of Ethon C. McLaughlin.)

(The reporter read the last three questions and answers.)

The Court: You may proceed.

Q. (By Mr. Howard): Captain, you were referring at that time to the fact that there was no lettering on the board that was hung over the side of the ship at the stern? A. Yes, sir.

Q. Extending by ropes or lines from the rail of the ship? A. Yes, sir. [130]

Q. By the way, Captain, does the turning of the propeller in the jacking gear or turning gear have any effect on the ship as far as causing it to move forward or aft?

Mr. Biele: Your Honor, I object to that. That wasn't gone into on cross-examination.

The Court: Was or was not?

Mr. Biele: It was not, your Honor.

The Court: You asked him something, did you not, something about a jack motion or something of that sort involving the propeller or the ship as a result of the jack motion of the propeller? Did you not make some inquiry about that, something about the jack motion, as I recall? Is it your assertion now that you do not recall having asked anything about jack motion at all?

Mr. Biele: I don't recall asking him whether it moved the ship or not, your Honor.

The Court: It is not a question of all of the effects of it. Can you name the type of question

(Testimony of Ethon C. McLaughlin.)

that you say you think he asked on cross which inspires this further interrogation?

Mr. Howard: Your Honor, my reason for asking that question is because your Honor asked certain questions about whether the ship was stationary or not after it came alongside the dock, and I'm trying to develop that or amplify that by showing that the ship [131] did not move forward or backward by reason of the operation of the jacking gear, and that was——

The Court: The Court is going to sustain the objection. I do not think Counsel is bound by what the Court did.

Mr. Howard: Well, your Honor, I will recall this witness in direct examination and present the same question.

The Court: Do you mean you ask to do that?

Mr. Howard: I ask to do that, your Honor.

The Court: Any objection?

Mr. Biele: No, your Honor.

The Court: Very well, you may do that.

Direct Examination

(Continued)

By Mr. Howard:

Q. Now, Captain McLaughlin, would the turning of the propeller in jacking gear or turning gear cause the ship to move forward or backward as it was moored to the dock by the mooring lines?

A. No, sir.

(Testimony of Ethon C. McLaughlin.)

The Court: Would it cause it to move sideways either way, left or right?

A. No, sir.

Q. (By Mr. Howard): This movement of the barges aft some [132] thirty feet by the tug, will you state whether that took place before or after the mooring line was secured between the ship and the barge?

A. Before, sir.

The Court: Was it any part of your duty at that time and place to be interested in tidal currents or any other type of water action where that vessel laid at that dock?

A. Yes, sir, because of the draft of the ship.

The Court: Did you observe whether or not there was any force or action taking effect on that vessel from any water currents or tidal movement or any other sort of force from water action?

A. No, sir, I didn't notice.

The Court: You did not?

A. I did not, sir.

The Court: You may inquire.

Redirect Examination

(Continued)

By Mr. Howard:

Q. Captain, on cross-examination Mr. Biele asked you about certain questions which were answered by you in your deposition on March 9th appearing at Page 109 of the deposition, specifically the questions which follow. [133]

“Q. Was there anyone on the afterdeck of the

(Testimony of Ethon C. McLaughlin.)

ship that you could observe when you went back aft for the first time?

“A. No, sir, no one whatsoever was there.”

Is that a correct statement? A. Yes, sir.

Q. Was there anyone on the afterdeck?

A. No, sir.

Q. The testimony which you have given today as to the position of Mr. Fulmer refers to his position where? A. On the main deck.

Q. On the main deck?

A. By the number four hatch.

Q. Is that shown by the symbol “F” on Exhibit 4? A. Yes, sir.

Q. Later on the same page the question was asked:

“Q. Was there anyone back there the second time when you got back there?”

“A. No, I can’t remember—not on the stern. I know there was no one at the stern.”

A. That’s right, sir.

Q. (Reading): “A. I was the first one that got back there again, and then the mates and the Captain joined me, and anyone else I can’t think.”

Is that a correct statement? [134]

A. Yes, sir.

Q. And is that your testimony today?

A. Yes, sir.

Q. And was Mr. Fulmer back on the stern at the time you got back there? A. No, sir.

Mr. Howard: That’s all I have, your Honor.

The Court: Any cross-examination?

(Testimony of Ethon C. McLaughlin.)

The Court: Would it cause it to move sideways either way, left or right?

A. No, sir.

Q. (By Mr. Howard): This movement of the barges aft some [132] thirty feet by the tug, will you state whether that took place before or after the mooring line was secured between the ship and the barge?

A. Before, sir.

The Court: Was it any part of your duty at that time and place to be interested in tidal currents or any other type of water action where that vessel laid at that dock?

A. Yes, sir, because of the draft of the ship.

The Court: Did you observe whether or not there was any force or action taking effect on that vessel from any water currents or tidal movement or any other sort of force from water action?

A. No, sir, I didn't notice.

The Court: You did not?

A. I did not, sir.

The Court: You may inquire.

Redirect Examination

(Continued)

By Mr. Howard:

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“A. No, I can’t remember—not on the stern. I know there was no one at the stern.”

A. That’s right, sir.

Q. (Reading): “A. I was the first one that got back there again, and then the mates and the Captain joined me, and anyone else I can’t think.”

Is that a correct statement? [134]

A. Yes, sir.

Q. And is that your testimony today?

A. Yes, sir.

Q. And was Mr. Fulmer back on the stern at the time you got back there? A. No, sir.

Mr. Howard: That’s all I have, your Honor.

The Court: Any cross-examination?

(Testimony of Ethon C. McLaughlin.)

Recross-Examination

By Mr. Biele:

Q. Mr. McLaughlin, were you aware that the jacking gear started and the propeller rotated at 1840?

A. No, sir.

Q. Do you know that now?

A. Well, if it's in the book here I know it. I would have to refer to the book, sir.

Q. You didn't know it then?

A. Yes. It's never the procedure to let me know.

Mr. Biele: That's all I have.

The Court: The witness is excused from the stand.

(Witness excused.)

The Court: Call another witness for the libelant. [135]

Mr. Howard: Call Mr. Dusevoir.

The Court: Come forward.

EUGENE DUSEVOIR

called as a witness in behalf of libelant, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Howard:

Q. Will you state your full name and residence address, please?

A. Eugene Dusevoir.

Q. Where do you live?

(Testimony of Eugene Dusevoir.)

The Court: How do you spell the last name?

A. It's spelled D-u-s-e-v-o-i-r.

The Court: You may proceed.

Q. (By Mr. Howard): Where do you live, Mr. Dusevoir?

A. I live at 8402 Southwest 30th Avenue in Portland, Oregon.

Q. Are you married? A. Yes.

Q. What is your age? A. Thirty-five.

Q. How long have you lived at that address in Portland?

A. That particular house eighteen months.

Q. And how long have you lived in Portland?

A. Approximately ten or twelve years. [136]

Q. What is your usual occupation, sir?

A. Well, I've been going to sea until this year past.

Q. Did you ever serve on the Cotton State?

A. Yes, sir.

Q. A C-2 vessel operated by States Marine Line? A. Yes, sir.

Q. And in what capacity did you serve on the Cotton State? A. I was boatswain.

Q. What papers do you hold issued by the United States Coast Guard?

A. Mariners Document No. 186900 issued in San Francisco in 1941.

Q. And for what is it endorsed?

A. Unlimited able seaman.

Q. How long have you been going to sea. Mr. Dusevoir? A. Since 1941.

(Testimony of Eugene Dusevoir.)

Q. How long did you serve on the Cotton State?

A. In excess of a year. I can't tell you exactly, but in excess of a year.

Q. Were you serving as boatswain on the Cotton State on January 10, 1957? A. Yes, sir.

Q. When the vessel was at Everett and involved in an accident by a barge striking the propeller? A. Yes, sir. [137]

Q. When did you leave the employment or when did you stop working on the Cotton State?

A. When the ship was sold to another company.

Q. About when was that?

A. In March or April of that same year in which the accident happened.

Q. That would be March or April, 1957?

A. To the best of my recollection, yes, sir.

Q. What type of work have you been doing since that time?

A. Longshoring in Portland.

Q. And are you employed as a longshoreman now? A. When I can get work, yes, sir.

Q. You're not employed in any way by States Marine Line at this time? A. No, sir.

Q. And have not been since March or April of 1957?

A. No, I correct that. I have been employed by States Marine since March or April, 1957. When that ship was sold I was transferred to another vessel of the company.

(Testimony of Eugene Dusevoir.)

Q. I beg your pardon. That was my error, sir. What other ship did you serve on?

A. On the new Cotton State.

Q. Another ship of a different type by the same name? A. Yes, sir.

Q. And how long did you work on that ship? [138]

A. Until November a year ago.

Q. Until November, 1957? A. Yes, sir.

Q. Have you been employed by States Marine Line since that date? A. No, sir.

Q. Now, what were your duties as boatswain on the Cotton State, a C-2 type vessel?

A. Generally supervisory in regards to the nine men deck department under the direction of the chief officer.

Q. At the time a vessel such as that is coming in to dock what would be your usual station?

A. Up forward on the bow with the chief officer and half of the deck department.

Q. Will you state where you were on the Cotton State on the evening of January 10, 1957, when it was arriving in Everett to dock at the Port Dock?

A. In my normal docking station on the bow.

Q. Prior to that had you made any preparations to handle barges alongside the ship?

A. Prior to that, no. Immediately prior to that, no.

Q. Will you state, please, what the condition was at the time the vessel made its landing at the

(Testimony of Eugene Dusevoir.)

dock at Everett with respect to daylight or darkness?

A. I can't answer other than the fact that I had a flashlight [139] with me, so I would have to make assumptions. I can't answer that from knowledge.

Q. What did you do, Mr. Dusevoir, after the lines were secured from the bow of the vessel to the dock at Everett?

A. I stayed forward after knocking off the rest of the men that were up there with me to check on the rat guards and other odds and ends, lock up places that have to be locked to keep longshoremen out of there and so on, and then before I left there the mate came back or got hold of me somehow and informed me that rather than knocking off that I would have to prepare to land some barges alongside the ship.

Q. And what did you do in preparation for handling the barges alongside the ship?

A. Got lines ready that were used for that purpose.

Q. What type of lines?

A. They're three and a half inch manila.

Q. And where did you put those lines?

A. On the starboard side, but exactly where I can't tell you, sir.

Q. Now, while you were on the forward deck and up to the time that you just now mentioned did you make any observation as to whether there was a tug and barges approaching along the off-shore or starboard side of the [140] ship?

(Testimony of Eugene Dusevoir.)

A. No, sir.

The Court: Whose lines were those that you got out?

A. Your Honor, they belonged to the vessel, the steamship in question.

The Court: Proceed.

Q. (By Mr. Howard): What did you do, Mr. Dusevoir, after you obtained these lines that you referred to?

A. I went back to find another man to assist me, because the chief officer had told me that this work had to be done and it required more than one person.

Q. And did you find another man to assist you?

A. The men had already been knocked off, so I went down below and picked the first one I could find who wasn't changing his clothes to go ashore, and that was a deck maintenance man. I told him to come out on deck and assist me in tying up these barges.

Q. Did he do so? A. Yes, sir.

Q. And where did he station himself?

A. I sent him back in the after part of the main deck in the area of number four and number five hatch to stand by there.

Q. And where did you go then, sir? [141]

A. I went and took a look to see where the barges were so that I could station myself where the forwardmost barge was.

Q. Did you notice barges when you looked on that occasion?

(Testimony of Eugene Dusevoir.)

A. I can't recall seeing any barges until I handed them a line, sir.

Q. I see. Now, where were you when you handed the barges a line?

A. In regards to the midship house of a C-2, I was standing on the cabin deck just about in the center of it, except that I had stepped out over the rail onto the gangway which was rigged out over the side of the vessel, so I was actually extending out over the side a little bit so that I could see better, in the midship section of the cabin deck on a C-2.

Mr. Howard: Counsel, do you have available for use for illustrative purposes the exhibit which we have stipulated may be admitted in this case, being the capacity plan of the vessel?

Mr. Biele: Yes, I have it, Mr. Howard.

Mr. Howard: May we use that at this time?

Mr. Biele: Are you making it your exhibit?

Mr. Howard: I would like to have this witness use it. I will do so if that is necessary.

(A document was handed to Mr. Howard.) [142]

Mr. Howard: May it be marked, please?

The Clerk: It will be marked Libelant's Exhibit No. 5.

(A C-2 type vessel capacity plan was marked Libelant's Exhibit No. 5 for identification.)

(Testimony of Eugene Dusevoir.)

Mr. Howard: I offer that in evidence, your Honor.

Mr. Biele: Your Honor, I would have no objection to that, but if the witness is going to mark it up I might have some.

The Court: That is not before the Court yet. Do you wish to give Counsel advance notice that you are going to object?

Mr. Biele: I wish to reserve my objection. I wish to object to it at this time—well, I'll let it go in but I'll object to any marking on it, your Honor.

The Court: It is admitted.

(Libelant's Exhibit No. 5 for identification was admitted in evidence.)

The Court: Do not make any marks on the paper unless the Court authorizes you to do so.

The Witness: Yes, sir.

Mr. Howard: May it be placed before the witness, your Honor? [143]

The Court: It may be. I would like someone to state, if he believes he can agreeably to opposing Counsel, what this thing is. Give it a name that reflects the information contained in it.

Mr. Howard: Your Honor, it is identified in the pretrial order as a capacity plan of a C-2 type vessel.

The Court: What is it, a cargo plan or a plan of—

Mr. Howard: Actually, it's a profile plan of the vessel, the Cotton State type.

(Testimony of Eugene Dusevoir.)

The Court: It does not emphasize a cargo plan as distinguished from something else?

Mr. Howard: Well, your Honor, the only reason I used the words "cargo" or "capacity plan" is because that is the wording that appears on the cover of the document.

The Court: It is a profile of a cargo plan; do you think that is reasonably accurate?

Mr. Howard: Profile or capacity plan.

The Court: What capacity? Carrying capacity, cargo capacity?

Mr. Howard: It shows the capacity of the various holds, your Honor.

The Court: Capacity for what purpose, just cubic footage, is that all, without reference to cargo?

Mr. Howard: It is used in determining the capacity for loading and discharge of cargo, stowage of cargo.

The Court: You may proceed.

Q. (By Mr. Howard): Now, Mr. Dusevoir, do you recognize what is before you now as Exhibit 5?

A. Yes, sir.

Q. Can you, without putting any marks on it, point out on that where you referred to as having been standing on the accommodation ladder?

A. Yes, sir.

Q. Will you do so with either your finger or your thumb?

A. My finger is laying here on a spot that says "Cabin Deck."

(Testimony of Eugene Dusevoir.)

Mr. Howard: Now, your Honor, I would like to ask that the witness be permitted to mark that position on this exhibit.

The Court: With what kind of a mark?

Mr. Howard: I beg your pardon?

The Court: With what kind of a mark?

Mr. Howard: A distinctive mark. I suggest a red pencil.

The Court: Do you wish him to put an "X" or a "Y" or a "Z" or a "B"— [145]

Mr. Howard: I would say "A-1" encircled.

The Court: You may do that.

Mr. Biele: Your Honor——

The Court: Pardon——

Mr. Biele: Excuse me. I was going to say I would object to that.

The Court: Why?

Mr. Biele: I think the record is clear enough now.

The Court: The objection is overruled. You may do that, Mr. Witness.

(Witness marks on Exhibit 5.)

Q. (By Mr. Howard): Now, Mr. Dusevoir, what was the position of the barges and of the tug when you saw them at that point?

A. The leadingmost barge was directly below me. The tug and the following barge I don't know, sir.

Q. When you say "the leadingmost barge," what part of the leadingmost barge?

(Testimony of Eugene Dusevoir.)

A. The bow of it.

Q. The forward end?

A. I think a barge is endless, but the end that was facing the same way as the ship was, sir.

The Court: You were standing where with reference to what? You say it was just below you. [146]

A. Your Honor, I was standing on a platform, an extension of a platform sticking out over the edge of the ship, and I was directly above the barge.

The Court: Yes, but whereabouts on the ship was this platform where you were standing or where you were?

A. It's an accommodation ladder that normally went from the deck where I was standing down to the water, but it was pulled up flush with the deck.

The Court: Was it on the outside of the vessel at the forepeak or at the sternpost, or where was it?

A. Well, amidships on the side of the vessel, sir.

The Court: Very well. You may proceed.

Q. (By Mr. Howard): And is that the point which you have marked on Exhibit 5?

A. Yes, sir.

Q. Does that show the deck level also at which you were standing?

A. In a dotted line it shows it, yes, sir.

Q. Now, you say you don't know where the tug was at that time? A. No, sir.

Q. Now, did you observe anybody on either the tug or the barges? [147]

A. Yes. The person I assumed to be the deck hand was on the barge.

(Testimony of Eugene Dusevoir.)

Q. And where was he on the barge?

A. On the bow section, not directly below me but very close in a direct line below me.

Q. Now, did you have any conversation with anyone on the barge or anyone on the tug at that time or thereafter?

A. Yes, sir, the normal three things that transpire whenever this occasion comes up. One is a warning and one is a question and one is a statement.

Q. What did you say first?

A. I said, "Heads up," which is the normal thing when you throw a line down to a person.

Q. And what was said next?

A. Second would be the question, "Where do you want it?" which is always done when you find out where they desire the line to be placed.

Q. And was there any response?

A. Yes, a point by the man on the barge pointing in my direction, and I can see this very well, to a cleat that was over his head but near my feet, and he pointed that he desired the line to be placed right on that cleat.

Q. And that was the deck hand from the tug who was on the barge or someone on the barge?

A. Yes, sir. [148]

Q. Was that anyone from the crew of the Cotton State?

A. Oh, no, sir.

Q. And as I understand, that man pointed or indicated where he wanted you to secure the line.

A. He indicated in some manner to me, yes.

(Testimony of Eugene Dusevoir.)

Q. And what if anything else was said?

A. Well, then the statement after I was finished making the line tight, I would sing out as I normally would, "All fast," which signifies that I had fastened my end of the line.

Q. Now, at that time or thereafter did you notice whether there were any lights being shone, burned, on either one of the barges?

A. I didn't notice any lights, no, sir.

Q. Did you have any conversation at that time or later with anybody on the deck of the tug or in the pilothouse of the tug?

A. No, sir.

Q. Now, what did you do after this man pointed out to you the cleat where he wanted you to tie up the barge mooring line?

A. I made the line fast after having taken the slack out.

Q. Who, if anyone, was present on the deck of the ship in the immediate vicinity of you when you did that?

A. Captain McLaughlin, the chief officer. [149]

Q. The chief officer?

A. Yes, sir.

Q. Did you hear him have any conversation with anyone on the barge or the tug at that time?

A. No, sir.

Q. Was there anyone else present at that moment, at that time?

A. Not to my knowledge.

Q. Now I'll ask you whether or not the point which you have designated as Point 1 on Exhibit 5 also represents the point where you tied up the barge mooring line to the cleat on the Cotton State?

(Testimony of Eugene Dusevoir.)

A. Within two feet of it, yes, sir, within the scope of the circle in which I surrounded my No. 1.

Q. And what did you do after you had done that, secured the line on the cleat, or what happened next?

A. I don't know what happened immediately, but it was very soon after that but after I had climbed back over the rail and come aboard the ship that the mate, not me but the mate, noticed something back aft was amiss; what, I don't know.

Q. Now excuse me. You say "come aboard the ship." You were never off the Cotton State?

A. I was on the gangway over the railing. I was actually suspended over the bay on the ship, yes, sir. [150]

Q. The gangway was suspended from the Cotton State? A. Yes.

Q. You weren't coming back aboard the ship in the sense that you had been aboard the barge?

A. No, but I climbed over the rail in an unorthodox manner.

Q. Now, you say that someone noticed that something was amiss astern? A. Yes.

Q. What did you observe on that occasion?

A. Nothing. Barges back aft, that's all I could tell you.

Q. Could you determine from that position where you had been or where you were at what the situation was at the after end of the barges?

A. No.

(Testimony of Eugene Dusevoir.)

Q. Could you see any lights at the after end of the barges?

A. Not on the barges, no, sir.

Q. Was it possible for you to determine whether the barge was extending beyond the stern of the vessel or was forward of the stern, rudder and propeller of the vessel?

A. I do not know.

Q. Now, after this observation was made, what happened next, Mr. Dusevoir?

A. I went down to somewhere along number four hatch where I had stationed the other day man to assist him or see that he was getting along all right and then went back [151] aft with the mate, who had already gone past on the main deck and up on the poop deck, and I went back there with the mate.

Q. Now, where was this man?

A. In the area of number four standing by the rail watching what was going on.

Q. Did you observe at that time whether the barges were in close against the side of the ship, or were they out some distance from the ship?

A. By this time I knew they were back under the stern, but when I got that information I don't know.

Q. Did you observe at that time whether there were any lines extending between the ship and the trailing barge? That would be Barge No. 15.

A. I didn't observe any, no, sir.

Q. Well, if there had been some would you have observed them?

(Testimony of Eugene Dusevoir.)

A. I'm sure I would have known it.

Q. Did you have any conversation with anybody on the barges when you were back aft of the mid-ship house?

A. I don't think so. Not that I recall.

Q. Did you see anybody on the after barge, No. 15, at that time?

A. I can't say. I know that a lot was going on at the moment, but I can't truthfully say I saw anyone there [152] or anywhere else, sir.

Q. Will you state whether or not you observed the situation with respect to the attachment of the one barge to the other barge? Were they still coupled together?

A. I do not know.

Q. Now, what did you observe when you went to the stern area?

A. The fact that the aftermost barge had apparently drifted under the stern, or had been put under there. Somehow it got under the stern of the Cotton State, and that the tugboat was—the man I assumed to be the captain of the tugboat, was yelling and screaming for his deck hand to jump aboard the stern of the tugboat, and they came—which he did. The tugboat came back, and I don't know, but a few seconds later he started to tow that aftermost barge toward the forward part of the Cotton State.

Q. In what manner was he towing it?

A. With a stern line, and I think to one bollard on the—one towing bitt on the aftermost barge.

Q. Was there anybody else on the stern of the

(Testimony of Eugene Dusevoir.)

Cotton State other than the chief mate when you first arrived back there?

A. Yes, several people.

Q. Several people? A. Several. [153]

Q. Do you know who they were? Do you recall who they were?

A. I only have to imagine they were longshoremen. I do not know, sir.

Q. Now, do you know whether or not there were lines available aft of the midship house which could have been used to secure either the one barge or the other barge to the side of the ship?

A. Yes, sir. I had put them there myself.

Q. You put them there? A. Yes, sir.

Q. Did you put them there before you went up to this position No. 1 on the accommodation ladder or platform? A. Yes, sir.

Q. Now, after the tug pulled this barge out from under the stern counter of the Cotton State, what did you do then?

A. I personally got a long straight ladder that I kept back aft which was the storage area on that ship, and I lashed it in such a manner that it was suspended over the side of the vessel in the area of the propeller at the request of the chief mate so that he could go down and inspect it.

Q. Did he do so?

A. After I had jumped on the ladder a couple of times to make sure it was safe, which is common policy and courtesy, and then I got back aboard the

(Testimony of Eugene Dusevoir.)

vessel and the chief officer with his light went down over the side of [154] the vessel on this ladder.

Q. By the way, what if any signs, warning boards or flashing lights were there in the stern area of the Cotton State on the evening this accident occurred?

Mr. Biele: Now, may I object to that unless he specifies as to what time, your Honor?

The Court: I think you should do that.

Q. (By Mr. Howard): As of the time you first arrived on the stern of the Cotton State that you just now described, what signs, warning devices or flashing lights were in place?

A. Well, I know two permanently affixed signs which were affixed to the rail on either side of the quarter of the ship were there, and, of course, the condition of the two barber poles is doubtful in my mind because one of them had been hit by this barge. This I knew.

Q. How do you know that?

A. Because the mate was dancing around with the end of the electric cord in his hand where it had been pulled loose from the barber pole.

Q. Did you thereafter see the damaged barber pole, as you describe it, lifted up to the deck?

A. I fixed it immediately so that it would be suspended in a horizontal position rather than the vertical one that it had been left in after the line had been parted. [155]

Q. Now, where had that barber pole been hung

(Testimony of Eugene Dusevoir.)

with reference to the stern? Was it on the offshore side or the inshore side?

A. There's one on either side, but the particular damaged one was on the offshore side of the ship.

Q. And do you know how it was damaged?

A. Only that the barge had been under there against it, and I assume that the collision between the two did it.

Q. Now, did you observe whether there was a warning board with flashing lights, a barber pole type of warning device with flashing lights on the inboard side or the dock side under the stern?

A. I did not observe it, no, sir.

Q. Do you know whether there was a fixed warning sign with the legend, "Warning, Propeller," or "Keep Clear"?

A. I didn't observe it but I know it was there.

Q. And how many of those were there in the stern area?

A. One on either quarter.

Q. At any time, Mr. Dusevoir, from the time that you first were aware of the presence of the barges alongside the Cotton State until after this accident occurred, did anyone on the tug or the barges ever request that the Cotton State provide mooring lines to secure Barge 15 to the Cotton State?

A. Not to my knowledge; no, sir. [156]

Q. Did you ever hear any such?

A. No, sir.

Q. To your knowledge was there ever any other line secured between the barges and the Cotton

(Testimony of Eugene Dusevoir.)

State other than the one which you described having fastened to the cleat at Point No. 1 on Exhibit 5? A. Not that I know of.

Q. After you fastened that line to the cleat, would it have been possible for that barge to move back aft because of any slack in the line?

A. Not because of slack in the line, but if the barge had been laying a few feet off the ship when I took the slack out of it, then it would be possible.

Q. Is that a fact? Was it laying a few feet off the ship? A. I don't know, sir.

Q. How much would it have moved aft?

A. It's a mathematical problem, but it would be about as much as there was slack in the line.

Q. Did you undertake to take all the slack out of the line? A. Yes, sir; definitely.

Q. All right.

The Court: What was the method of doing that?

A. It's to pull on it, your Honor, to remove all the slack.

The Court: By hand or something else? [157]

A. No, by hand.

Mr. Howard: That's all I have on direct examination.

The Court: You may cross-examine.

(Testimony of Eugene Dusevoir.)

Cross-Examination

By Mr. Biele:

Q. Mr. Dusevoir, after you secured this line, did you remain to observe whether the line stayed tight or not, or did you go back aft?

A. I went back aft, I think.

Q. You left this line unattended then?

A. After I had finished fastening it, yes.

Q. And you don't know what happened to the line thereafter?

A. No; I didn't stay there and watch it.

Q. Now, at the time that you tied up the scow with this line forward had you had any conversation with the engineers?

A. The ship's engineers? No, sir.

Q. Had you been told that the propeller was going to turn over? A. No, sir.

Q. From where you were standing on the cabin deck of the Cotton State you were looking down on the lumber, were you not? [158]

A. I was looking down on the forward part of the barge ahead of the lumber.

Q. Well, you had a birdseye view of the scow?

A. Yes, sir.

Q. From where you were standing could you see back aft to the stern of the ship, too?

A. Yes.

Q. Now, was there any trouble to the scows before this line that you secured was accomplished?

(Testimony of Eugene Dusevoir.)

A. I don't understand what you mean by trouble, sir.

Q. Well, did you see the scows in any trouble before you finished securing the line?

A. The scows themselves, no.

Q. Then is it a fair statement that at the time you got the line secured the scows were still in good shape?

A. Yes, sir.

Mr. Biele: I think that's all, your Honor.

The Court: Anything further?

Redirect Examination

By Mr. Howard:

Q. From the position that you described in answer to a question by Mr. Biele at the accommodation ladder looking down on the lumber on the scow was it possible for you to determine where the stern end of the tow was [159] with reference to the stern of the Cotton State?

A. I think it may have been possible but I didn't do it, sir.

Q. Were there any lights on the barge at the stern?

A. On the barge, no, sir.

Mr. Howard: That's all.

The Court: Anything further?

Mr. Biele: May I consult with Mr. Crutcher a moment, your Honor?

The Court: Yes; you may.

(Brief pause.)

Mr. Biele: We have no questions, your Honor.

The Court: You may step down, Mr. Dusevoir.

The Witness: Thank you.

(Witness excused.)

The Court: Call the next witness.

Mr. Howard: Mr. Fulmer.

CALVIN DON FULMER

called as a witness in behalf of libelant, being first duly sworn, was examined and testified as follows:

The Court: How do you spell your last name?

A. F-u-l-m-e-r. One "l."

Direct Examination

By Mr. Howard:

Q. And your full name, sir? [160]

A. Calvin Don Fulmer.

Q. And your address?

A. 215 Ridge Road, Moses Lake.

Q. Moses Lake, Washington?

A. Yes, sir.

Q. What is your occupation, Mr. Fulmer?

A. My occupation has been a seaman and a rigger.

Q. And how old are you, sir?

A. I am now fifty years old.

Q. What documents do you hold issued by the United States Coast Guard?

A. I hold an able seaman's unlimited document.

Q. Have you ever served on the Cotton State

(Testimony of Calvin Don Fulmer.)

operated by the States Marine Lines, a C-2 type vessel?

A. Yes, sir.

Q. Were you serving on the Cotton State on January 10, 1957, when that vessel was involved in an accident to its propeller at Everett, Washington?

A. Yes, sir.

Q. And in what capacity were you serving?

A. I was serving as deck maintenance at the time.

The Court: That was on the Cotton State?

A. The Cotton State, yes, sir.

Q. (By Mr. Howard): By the way, Mr. Fulmer, are you employed at the present time? [161]

A. I am unemployed now.

Q. And when did you last serve on the Cotton State or any other vessel owned by States Marine Line?

A. The last time I served on the Cotton State was when she was sold in Galveston, Texas.

Q. You haven't been employed by States Marine Line since March of 1957?

A. Not with the States Marine Line.

Q. Do you expect to accept a position on some other vessel operated by some other company here in the immediate future?

A. I expect to go to work as pump man on a little tanker here.

Q. On a tanker? A. Yes.

Q. Not operated by States Marine Line?

A. No.

Q. Now——

(Testimony of Calvin Don Fulmer.)

The Court: What is the present condition of employment in the merchant seamen's trade?

A. The condition of the merchant seamen's trade?

The Court: Yes.

A. There isn't any.

The Court: There is not any employment, [162] is that what you mean to say?

A. I don't—

The Court: What are the employment conditions in the business or the shipping world as it relates to the employability of merchant seamen?

A. Oh, I understand you, your Honor. You see, I am—

The Court: Is it good or bad?

A. I am in Group 2 with the union because I was rigging and let my union book lapse.

The Court: Are the employment conditions good now so all a fellow has to do is to put his name on the board now or have it put there and he will be sent out the next day?

A. No, sir.

The Court: What is the condition?

A. The condition now, you have to have a full book.

The Court: You may proceed.

Q. (By Mr. Howard): Mr. Fulmer, what was your station on the Cotton State when it was arriving at the dock at Everett, Washington, on the evening of January 10th to make a landing?

A. I was forward when she was coming in to

(Testimony of Calvin Don Fulmer.)

make the landing, tying up, with the [163] boatswain.

Q. You were in the crew with the chief mate at the bow of the vessel? A. Yes, sir.

Q. Incidentally, what was the condition of the visibility at that time?

A. The visibility was, I'd say, about—it was dim.

Q. It was what?

A. When we were tying up it was very dim and it was getting dark and it was dark when we finished. It was so dark we couldn't see.

Q. Now, after you had tied up the lines at the bow of the vessel, did you have any other assignment?

A. After we tied up the bow—after I had finished up there, the only assignment I had was the boatswain says, "We'll tie up these barges. You assist me."

Q. And where did you go to assume the position to do that job?

A. Where the boatswain had stationed me.

Q. And where was that, please?

A. Just aft, just the break of the well deck.

The Court: The well deck is where from the stern?

A. Oh, the well deck is midships. I call it the well deck.

Mr. Howard: May the witness have Exhibit 5, [164] please?

(Testimony of Calvin Don Fulmer.)

(Libelant's Exhibit No. 5 was handed to the witness.)

Q. (By Mr. Howard): Can you point out on Exhibit 5 the position that you refer to where you assumed your position to assist in tying up the barges? I suggest that when you locate that position that you mark it with a "2" with a circle around it.

A. It was right in here (marking on Ex. 5).

The Court: If he could put the initial of his last name, I think that would be a good idea.

Mr. Howard: Very well.

The Court: Because another witness has put marks on the same exhibit.

Mr. Howard: May Counsel see this exhibit?

The Court: Yes. Let opposing Counsel see it likewise.

(Brief pause.)

Q. (By Mr. Howard): The position that you have marked, Mr. Fulmer, might otherwise be described as near the forward end of number four hatch?

A. It could be described as the forward end of number four hatch or between number four hatch and the entrance to the passageway.

Q. All right. Now, while you were in that position, did you [165] observe any tug and barges approaching the offshore side of the vessel?

A. Certainly I observed them. That's my job.

(Testimony of Calvin Don Fulmer.)

Q. Where were the tug and barges when you first observed them?

A. When I first observed them, one of them had already got the line out, and I held this three and a half inch hawser in my hand to pass the line. That's what I'm there for, and——

Q. Was there anyone on the barges in the vicinity of where you were standing?

A. Not in the vicinity of where I was standing, no, sir.

Q. Did you ever pass that line or were you ever requested to pass the line to anyone on the barges?

A. I never passed it. I wasn't requested to pass it, but I wanted to pass it. Don't misunderstand me. I could have passed it, but it wouldn't have helped.

Q. Why not?

A. Because there was no one there to ask for it or to receive it and it wouldn't have helped anyway.

Q. Now, you have referred to one line having already been attached between the barge and the ship. Where was that line that you referred to?

A. That is the line that the boatswain had secured.

Q. All right. Referring to Exhibit 5, will you notice the [166] mark on that, and I'll ask you whether or not that represents the position where the boatswain secured the line to the leading barge?

The Court: Tell him what the mark is.

A. I see it.

(Testimony of Calvin Don Fulmer.)

Q. (By Mr. Howard): It's the one with the circle around it, Mr. Fulmer.

A. I understand it. I understand the ships. That is as approximate as I could put it, and I was there.

Q. Now, after you noticed that that line had been secured between the Cotton State and the forward end of the leading barge, will you state whether or not there was any movement of either of the barges toward the aft or stern part of the Cotton State?

A. After this line—may I answer this in a sailor's way? After this line had been secured there was no movement and no slack in that line, because when a sailor secures a line, it's secure. There was no slack in it.

Q. Then the barges did not move aft after you observed that line secured by the boatswain to the cleat on the Cotton State?

A. That's exactly right.

Q. Did you ever receive any request from anyone on the tug or the barges to pass a line over to the barges to secure either the E-15, the trailing barge, or the E-25, [167] the forward barge?

A. I can assure you that I did not.

Q. Did you ever see any lights burning at any point on either one of the barges there?

A. There was no lights on the barges.

Q. If there had been lights, would you have seen them?

A. Well, certainly I would have seen them.

Q. Did you observe any movement of the deck

(Testimony of Calvin Don Fulmer.)

hand or anyone on the barge while you were in your position that you have marked on Exhibit 5 there? Did anyone come across the barge in any direction?

A. This sailor on the barge was by himself.

Q. Yes.

A. He had a big job, and that's the only gentleman I saw.

Q. And where was he on the barge?

A. He was there to receive the line and make it fast, and after that he tried to do his job. That's all I know.

Q. Did he come aft towards the stern of the tow, towards the aft end of the tow?

A. Yes, sir; he come aft.

Q. How were the two barges connected together, Mr. Fulmer?

A. They were tied, what a sailor would call block and block. Block and block means less than three feet.

Q. They were less than three feet apart?

The Court: You say that term was block [168] what?

A. Block and block.

The Court: Oh, block and block.

Q. (By Mr. Howard): Less than three feet apart, is that right? A. They were snug up.

Q. Did the trailing barge or the aftermost barge, was that in close alongside the offshore side of the Cotton State when you first observed it?

A. The barge that was the trailing barge, as

(Testimony of Calvin Don Fulmer.)

you call it, was not in close, but she—after the boatswain had made this fast she began to come in, and the tug went to get it and move it. Do you understand what I mean?

Q. Yes, sir.

A. Had he been able to go ahead and get ahold of that, it wouldn't have got under the stern.

Q. Did you hear any conversation between the man on the barge and the master or the operator of the tug?

A. The man that was operating the tug and the man on the barge were talking back and forth, like sailors would do.

Q. What was said that you recall?

A. That I cannot say. I don't—

The Court: Did you see any fender or fenders of any description between the barge and the ship's side?

A. The only fender I saw was what we'd call a four-by-four or a two-by-four, a four-by-four, it's a [169] small fender, and it parted.

The Court: How was that being used? Was it being held in somebody's hand or under someone's control at the moment, or was it something that had been thrown in the water before this operation began?

A. Judge, your Honor, it wasn't thrown in the water. It's like a fender on the ship, it's put there and it's made fast.

The Court: Who put it there, if you know?

A. I do not know.

(Testimony of Calvin Don Fulmer.)

The Court: On what thing was it fastened, this fender? Was it fastened to something?

A. Judge, your Honor, it is a fender and it can't be hanging there. Yes, it is fastened to something.

The Court: It either has to be afloat or it has to be tied to something.

A. Certainly.

The Court: How, then, was it engaged?

A. I don't know how it was engaged. I didn't put it over. Had I put the fender over I could——

The Court: Did it appear to be tied to the ship or part of the ship's gear or something put out by the ship, or did it appear to be something belonging to the barge or to someone on the barge or in someone's hands who was operating from the barge? How did it [170] happen to appear to you? What was its surrounding rigging or use to which it was being put at the time?

A. That's a very difficult question for a sailor to answer, because to me it's a fender and it's hanging over there.

The Court: I do not know what it was hanging over. That is what I am trying to find out.

A. Yes.

Q. (By Mr. Howard): Was it hanging over from some point on the barge?

A. I don't—that I cannot answer, but the fender is there. I can see the fender is there. It's like——

The Court: Was it a two-by-four?

A. A four by four, I'd call it a four-by-four.

(Testimony of Calvin Don Fulmer.)

The Court: Would it not be something like a matchstick?

A. A four-by-four is a four-inch board. It's square.

The Court: This was a four-by-four?

A. It looked to me, it appeared to be a four-by-four. It might have been a two-by-four. You cannot judge those things, your Honor.

The Court: But was not the weight of those laden barges and the weight of the ship if they should [171] be brought into contact such that a four-by-four or two-by-four would be mashed like a matchstick between them, would it not?

A. Not with just a barge. It would be crushed and break.

The Court: You may inquire.

Q. (By Mr. Howard): Mr. Fulmer, getting back to this man who was on the barge, he was not a member of the crew of the Cotton State, was he?

A. The man on the barge, definitely not.

Q. Did you hear that man on the barge at any time make any report to the master of the tug as to the position of the trailing barge No. 15 near or under the stern of the Cotton State?

Mr. Biele: I object to that, your Honor, as leading.

The Court: Please read the question.

(The reporter read the last question.)

The Court: Overruled.

Q. (By Mr. Howard): Can you answer that

(Testimony of Calvin Don Fulmer.)

question, sir? A. I will answer it.

The Court: It will be read again if you did not quite catch it.

Q. (By Mr. Howard): Would you like it read again?

A. Read it once more. [172]

The Court: Read the question again.

(The reporter re-read the question.)

Mr. Biele: Your Honor, I think he has testified to that already. He said he didn't hear him, about two or three questions back.

Mr. Howard: I don't believe that question or anything near it was asked, your Honor.

The Court: If it was stated before the Court did not quite get it and the Court overrules the objection to accommodate the Court, not because Counsel is not entitled to the objection. It is because the Court would be inconvenienced by hearing the answer to this particular question in this connection.

Mr. Biele: All right, your Honor.

A. When the barge is under—after this excitement is all starting, then I heard a conversation. I didn't know what it was, I didn't listen to what it was, because there was nothing I could do, your Honor, to avoid that accident. I would have put a ladder over there to push it away.

The Court: That is sufficient, Mr. Fulmer.

Q. (By Mr. Howard): Did anybody on the Cotton State participate in that conversation?

(Testimony of Calvin Don Fulmer.)

A. No one on the Cotton State.

Q. Mr. Fulmer, do you know whether at that time the flashing [173] light and the propeller warning board were in place at the stern of the Cotton State on the offshore side?

A. Yes, sir, I'm definitely positive because I was in a position to see that they were.

Q. After the accident occurred did you go back to the stern area?

A. I went back to the stern area with the mate. I am there. If I could have helped those men on that tugboat to keep that out of there——

The Court: No, do not make volunteer suggestions like that. Just answer the questions.

A. Yes, your Honor.

Q. (By Mr. Howard): Mr. Fulmer, just please listen closely to the question now. What did you observe with respect to the flashing light and propeller warning board when you went to the stern area from your position that you have marked on there?

A. I could see the lights were lit.

Q. Was there any damage to the propeller warning board that you observed when you went back there?

A. Oh, when I went aft, certainly there was damage to it.

Q. That's what I mean.

A. It was smashed up, just like the Judge, your Honor, asked me. It was hanging by one line and the line was parted.

(Testimony of Calvin Don Fulmer.)

Q. Was the electric light cord damaged in any way? [174]

A. It was broken.

Q. How about the propeller warning light on the other side of the stern, do you know whether that was burning or not?

A. That I did not notice.

Q. You didn't notice. What did the tug do with respect to the barge when you went back aft?

A. The tug was doing all in his power to get it out of there.

Q. Did the tug move the barge out?

A. He got it, but it was after it had hit.

Q. Now, Mr. Fulmer, was that barge at any time secured by a line to the Cotton State?

A. No, sir.

Mr. Howard: That's all.

The Court: Cross-examine.

Cross-Examination

By Mr. Biele:

Q. Mr. Fulmer, the boatswain was one deck above you, was he not? A. Yes, sir.

Q. So that you couldn't observe him as he performed his work, could you?

A. He was one deck above me but he was on—you see, the gangway isn't down, it is lowered, ready to be lowered, you understand what I mean, by the ship. So you can [175] step out on that gangway and you're—I could observe him.

(Testimony of Calvin Don Fuher.)

Q. Well, you saw him scure the line to the forward scow?

The Court: "Did you no?"

Q. (By Mr. Biele): Didn't you?

A. I did see him secure the line, yes, sir.

Q. Now, when that was done was the forward scow and the after scow blok to block as you have described them? A. Yes.

Q. And the line that the boatswain had secured in effect was holding the ater scow, the two scows were tied together, were thy not? A. Yes.

Q. And there was a line to the forward scow, was there not?

A. The forward scow is made fast.

Q. And through the forward scow the after scow was tied up?

A. They're tied together, the two scows are together. There is no line in the ship between them.

Q. No, but there was line from the ship to the forward scow that was scured? A. Yes.

Q. And there were two lines between the two scows that secured the brward scow and the after scow, and those were block to block or about less than three feet, were thy not? [176]

A. (Witness nods his head.)

Q. All right. When you saw this after scow go under or go against the side of the ship you indicated you would have one anything to have helped, did you not? Did you lo anything?

Q. I didn't only irlicate it, I would have.

Q. Well, did you do anything?

(Testimony of Calvin Don Fulmer.)

A. How am I going to get on the scow? I'm a sailor on deck. How am I going to get on that scow to do anything? I cannot do that. I can only take orders from them. I'll give them anything they'd have hollered for.

Q. Did you know at that time that the propeller was turning?

A. I did not know the propeller was turning.

Q. Would you have called the engine room if you had known the propeller was turning?

A. I would have notified Mr. McLaughlin.

Q. You didn't do that, however?

A. I didn't know it was turning.

The Court: Where you were standing at the forward side of number four hatch, was that forward of the house, the ship's house?

A. No, the ship's house is forward of that. I'm aft of the ship's house.

The Court: How many hatches are forward of the ship's house, if you recall? Are there two or more? [177]

A. There is three.

The Court: Three, and the fourth hatch is the first aft of the house, is that right?

A. Yes. There's two aft, four and five.

The Court: You may inquire.

Q. (By Mr. Biele): How far was it, Mr. Fulmer, from where you were to where the propeller was on the ship?

A. That I cannot measure without using a slide rule.

Q. Well, from where you were——

(Testimony of Calvin Don Fulmer.)

Q. Well, you saw him secure the line to the forward scow?

The Court: "Did you not?"

Q. (By Mr. Biele): Didn't you?

A. I did see him secure the line, yes, sir.

Q. Now, when that was done was the forward scow and the after scow block to block as you have described them? A. Yes.

Q. And the line that the boatswain had secured in effect was holding the after scow, the two scows were tied together, were they not? A. Yes.

Q. And there was a line to the forward scow, was there not?

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Q. No, but there was a line from the ship to the forward scow that was secured? A. Yes.

Q. And there were two lines between the two scows that secured the forward scow and the after scow, and those were block to block or about less than three feet, were they not? [176]

A. (Witness nods his head.)

Q. All right. When you saw this after scow go under or go against the side of the ship you indicated you would have done anything to have helped, did you not? Did you do anything?

Q. I didn't only indicate it, I would have.

Q. Well, did you do anything?

(Testimony of Calvin Don Fulmer.)

A. How am I going to get on the scow? I'm a sailor on deck. How am I going to get on that scow to do anything? I cannot do that. I can only take orders from them. I'll give them anything they'd have hollered for.

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Q. You didn't do that, however?

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The Court: Where you were standing at the forward side of number four hatch, was that forward of the house, the ship's house?

A. No, the ship's house is forward of that. I'm aft of the ship's house.

The Court: How many hatches are forward of the ship's house, if you recall? Are there two or more? [177]

A. There is three.

The Court: Three, and the fourth hatch is the first aft of the house, is that right?

A. Yes. There's two aft, four and five.

The Court: You may inquire.

Q. (By Mr. Biele): How far was it, Mr. Fulmer, from where you were to where the propeller was on the ship?

A. That I cannot measure without using a slide rule.

Q. Well, from where you were——

(Testimony of Calvin Don Fulmer.)

A. And reading this blueprint.

Q. From where you were could you see back towards the propeller area?

A. I could see back—Judge, your Honor—

The Court: That is not required, Mr. Fulmer.

A. O.K.

The Court: Just answer the question, and when you have finished that it is his responsibility to ask another.

A. Yes, I can see.

Mr. Biele: May I confer with Mr. Crutcher a minute, your Honor?

The Court: Yes, you may.

(Brief pause.)

Mr. Biele: I think that's all, your Honor.

The Court: You may step down. [178]

Mr. Howard: I have some redirect, your Honor, just very brief.

The Court: As briefly as possible, Mr. Howard.

Redirect Examination

By Mr. Howard:

Q. When the tug moved the after scow out, how was it separated from the forward scow?

A. When it pulled it out?

Q. Yes.

A. I don't understand, how it was separated. It was separated.

Q. You have testified, Mr. Fulmer, that they were coupled together with short lines.

(Testimony of Calvin Don Fulmer.)

A. Yes.

Q. Did someone cast those lines loose?

A. The deck hand must have cast them loose and let——

Q. The man on the barge cast them loose?

A. He must have.

Q. The after barge was moved out by itself, it was not still attached to the forward barge?

A. The after barge was not moved out by itself.

Q. Pulled out by itself?

A. Yes, the tugboat got ahold of it.

Q. The tugboat pulled that barge out by [179] itself? A. Yes.

Q. It was no longer attached to the forward barge?

A. It was cast loose and they pulled it out.

Q. And that was done by the man on the barge, is that right?

A. That's right. It couldn't have been done by anyone else.

Mr. Howard: That's all, your Honor.

Mr. Biele: May I have one——

The Court: Yes, you may.

Recross-Examination

By Mr. Biele:

Q. Mr. Fulmer, this casting off that you have described of the after barge was accomplished or done after the damage to the propeller was done, was it not?

A. After the damage was done, yes.

(Testimony of Calvin Don Fulmer.)

Q. But before the damage was done the two scows were coupled together, were they not?

A. That's right, sir.

Mr. Biele: That's all, your Honor.

The Court: Mr. Fulmer, which side of the Mississippi did you grow up on? You were there for quite awhile before you started out going to sea, were you not?

A. Yes, sir. I've been going to sea since 1926, your Honor. [180]

The Court: Where was your early stamping grounds?

A. That's Alabama.

The Court: You may step aside.

(Witness excused.)

The Court: Court is now at recess for ten minutes.

(Short recess.) [181]

Wednesday, November 26, 1958—After
Midafternoon Recess

(All parties present as before.)

The Court: You may proceed.

Mr. Howard: I would like to read a deposition, your Honor.

The Court: You may do that.

Mr. Howard: I would like to offer in evidence at this time the testimony of Otto K. Boltz by deposition taken at New York.

The Court: The Court will reserve ruling until it is finished.

Mr. Howard: I beg your pardon?

The Court: The Court will reserve ruling until the deposition is read in case there might be some parts of it ruled out.

Mr. Howard: Very well.

(Thereupon, the deposition of Otto K. Boltz was read as follows:)

DEPOSITION OF OTTO K. BOLTZ

“Q. Mr. Boltz, by whom are you employed?

“A. States Marine Corporation.

“Q. In what capacity?

“A. Chief engineer.

“Q. How long have you been in that employment? A. Close to 11 years. [182]

“Q. Are you presently employed by States Marine Corporation? A. Yes, sir.

“Q. On what vessel?

“A. SS Green Mountain State.

“Q. In what capacity?

“A. Chief engineer.

“Q. Is that vessel now in the course of a voyage?

“A. No, it is laying in Port Newark.

“Q. When do you expect to depart from Port Newark?

“A. We have to shift to Brooklyn about a couple of days, I guess.

“Q. And then you are proceeding to sea?

“A. Then to Camden, yes.

(Deposition of Otto K. Boltz.)

“Q. Well, the vessel is now in the course of a voyage? A. Discharging cargo.

“Q. Where is your home?

“A. 2974 Burdick Drive, Oakland, California.

“Q. On January 10, 1957, by whom were you employed?

“A. States Marine Corporation of New York.

“Q. On what vessel?

“A. SS Cotton State.

“Q. In what capacity?

“A. Chief engineer.

“Q. Previously to January 10, 1957, how long had you been sailing on that vessel as her chief engineer? [183]

“A. It was close to four months, going on four months.

“Q. And you have continued in her service after January 10, 1957? A. That is correct.

“Q. For about how long?

“A. Until we turned the ship over to the Bloomfield Steamship Company in April.

“Q. You continued on her as chief engineer until April, 1957?

“A. Yes, we changed it for another ship.

“Q. What type vessel is the Cotton State as to class? A. A C-2 type.

“Q. Is she powered by steam? A. Yes, sir.

“Q. And what mode of propulsion?

“A. She has a 6000 horsepower cross-compound steam turbine.

“Q. With H P and L P units?

(Deposition of Otto K. Boltz.)

“A. Yes, right.

“Q. What manufacture?

“A. General Electric.

“Q. Driving how many propellers?

“A. One.

“Q. What is the diameter of her propeller?

“A. 19 feet 6 inches.

“Q. On the morning of January 10, 1957, was the Cotton State located at Pier 58, Seattle, Washington? [184] A. Yes.

“Q. Did she depart from that port on that day for the port of Everett, Washington?

“A. Yes, sir.

“Q. Previously to the departure from Seattle on January 10th, what, if any, inspections were personally made by you of the stern area propeller rudder of the Cotton State?

“A. The captain, the mate and myself, we always do the propeller and hull inspection before the ship departs port—also when the ship comes into port.

“Q. And did you do so on that day before leaving Seattle? A. Yes, sir.

“Q. Was the propeller at rest or was the propeller turning? A. She was turning.

“Q. By what means?

“A. The jacking gear.

“Q. And what, if anything, did you see?

“A. That all blades were all right with the exception of No. 4 blade, the tip was missing.

“Q. About how much of the tip was missing?

(Deposition of Otto K. Boltz.)

“A. I would say approximately from the dock side looking at it, 4 to 6 inches.

“Q. Was that a break or was it a parting or severing of some previous repair? [185]

“A. That had been previously tipped and damaged and had been brazed and polished.

“Q. And was the missing tip a break-off of the braze?

“A. Yes, showed definitely it was a break in the braze.

“Q. Was that an old damage?

“A. Yes, that was previous.

“Q. Could that in any way affect the efficiency of the propeller or the use of the engines?

“A. No, sir.

“Q. Was it of such a character as to require immediate repair? A. No.

“Q. How are the blades numbered?

“A. 1, 2, 3 and 4.

“Q. On the inspection previously to leaving Seattle which you described for us, what blade was the one which was previously damaged?

“A. No. 4 blade.

“Q. Did you also see Nos. 1, 2 and 3 blades at Seattle? A. Yes, sir.

“Q. Could you tell the Court what condition you observed on that date?

“A. Nos. 1, 2 and 3 blades was all right, there was no damage to those blades.

“Q. Did you see both the leading and trailing edges? [186] A. Yes, sir.

(Deposition of Otto K. Boltz.)

“Q. And the tips? A. They were O.K.

“Q. As the propeller blades were turning in the vertical position at Seattle by use of the jacking gear, about how much of the blades were out of the water, if at all?

“A. Well, according to the draft—the ship was light, and it must have been something between 16 and 18 feet draft by the stern at light draft.

“Q. How much of the propeller blades could you see?

“A. For a rough guess I would say I could see three to four feet at least.

“Q. Did you observe the conditions that you previously described to us? A. Yes, sir.

“Q. I show you a book and ask you what it is (handing to witness).

“A. That is the engine room rough logbook.”

Mr. Howard: Pardon me just a minute.

The Clerk: It will be Libelant's Exhibit 6.

(Engine room rough logbook was marked Libelant's Exhibit No. 6 for identification.)

Mr. Howard: Did you have a question to me, Mr. Biele?

(The reading of the deposition of Otto [187] K. Boltz was continued as follows:)

“Q. Is that kept in the regular course of business? A. Yes, sir.”

Mr. Howard: We offer Exhibit 6, your Honor.

The Court: Any objection?

(Deposition of Otto K. Boltz.)

Mr. Biele: No objection, your Honor.

The Court: It is admitted.

(Libelant's Exhibit No. 6 for identification was admitted in evidence.)

(The reading of the deposition of Otto K. Boltz was continued as follows:)

"Q. Is this book which you have identified as the rough engine logbook, Libelant's Exhibit 6 for identification, the book of original entry?

"A. Yes, sir.

"Q. Did you make any entry in your own handwriting or did you cause any entry to be made of the inspection made of the propeller at Seattle on January 10, 1957?

"A. That is made in my own handwriting.

"Q. What, if any, entry did you make? Will you please read it to us—that is before leaving Seattle.

A. (Reading): 'At 1545——' "

The Court: What page of this deposition are you reading from?

Mr. Howard: On Page 8 of the deposition, your [188] Honor.

The Court: "1545" is what you last read, is it not?

Mr. Howard: Yes, your Honor.

The Court: You may read the next question.

(The reading of the deposition of Otto K. Boltz was continued as follows:)

"Q. What date are you now reading from?

(Deposition of Otto K. Boltz.)

"A. That is dated January 10th.

"Q. At what port?

"A. At Seattle, Washington. (Reading): 'At 1545 captain and chief mate and chief engineer inspected after end of vessel and propeller and No. 4 blade tip missing, no damage. O B.'

"Q. I show you another book and ask you what it is (handing to witness).

"A. That is the smooth engine room logbook.

"Q. I notice that there is attached to it white sheets. What are they?

"A. Those are engine room abstracts. They have the date on every trip made.

"Q. Does this book include the date of January 10, 1957? A. Yes, sir.

"Q. Is it kept in the regular course of the ship's business?

"A. Yes, but this is the smooth log—the voyage ended and [189] the other smooth log was started. This is from——

"Q. From January 6th to March 8th?

"A. That includes the 10th, yes."

The Clerk: Libelant's Exhibit No. 7.

(Engine room smooth logbook was marked Libelant's Exhibit No. 7 for identification.)

The Court: Libelant's Exhibit 7, is that right?

The Clerk: Yes, your Honor.

Mr. Howard: I offer Exhibit 7, your Honor.

Mr. Biele: No objection.

The Court: Admitted.

(Deposition of Otto K. Boltz.)

(Libelant's Exhibit No. 7 for identification was admitted in evidence.)

(The reading of the deposition of Otto K. Boltz was continued as follows:)

"Q. I show you another volume and ask you what that is (handing to witness).

"A. That is the engine room bell book.

"Q. Is that also kept in the regular course of business? A. Yes, sir.

"Q. Does that include the engine movements for January 10, 1957?

"A. That is correct."

The Court: I cannot half the time find the [190] places in these depositions that do not have numbered lines. What page in the deposition and line did you last read from?

Mr. Howard: We just completed at the bottom of Page 9, your Honor.

The Court: You may proceed.

The Clerk: Libelant's Exhibit 8.

(Engine room bell book was marked Libelant's Exhibit No. 8 for identification.)

The Court: What is Libelant's Exhibit No. 7? Do Counsel know what it is? If so——

Mr. Howard: It is the smooth engine logbook.

The Court: That smooth engine room logbook is already Libelant's Exhibit 6.

Mr. Howard: That is the rough engine room log, your Honor.

(Deposition of Otto K. Boltz.)

The Court: It was stated it was the smooth engine room logbook. It is so stated—is that the one that is referred to in the first answer at the top of Page 8, the rough logbook?

Mr. Howard: Yes, your Honor.

The Court: Is that No. 6?

Mr. Howard: Yes, your Honor.

The Court: No. 7 is the smooth, is it?

Mr. Howard: Yes, your Honor. [191]

The Court: You may proceed. No. 8, you say, Mr. Clerk?

The Clerk: The engine bell book.

The Court: Is it marked No. 8?

The Clerk: Yes, your Honor.

The Court: Very well. What do you call that?

Mr. Howard: Engine bell book.

The Court: You may proceed. It is referred to on what page?

Mr. Howard: The top of Page 10. I offer Exhibit 8.

The Court: Any objection?

Mr. Biele: No, your Honor.

The Court: It is admitted.

(Libelant's Exhibit No. 8 for identification was admitted in evidence.)

(The reading of the deposition of Otto K. Boltz was continued as follows:)

“Q. Mr. Boltz, at any time you wish to refresh your recollection with either or any of these documents, do so. You are free to refer to them.

(Deposition of Otto K. Boltz.)

“A. All right, sir.

“Q. We are here concerned with the damage sustained by the propeller of the Cotton State at Everett, Washington, on the evening of January 10, 1957. Will you [192] describe for the Court the general appurtenances which are maintained on the Cotton State, including the date of January 10, 1957, with respect to warnings for other vessels or craft to keep clear of the propeller?

“A. When the ship is alongside the dock there is one bar lowered over each side on the after end of the stern, approximately 9 feet long, to which is a marine warning type light attached, and has a 60 to 75 bulb inside.

“Q. 60 to 75-watt?

“A. Yes, and the glass cover on the light is red.

“Q. What, if any, other signs did you have?

“A. This light flashes at intermittent seconds, three to four seconds, flashes red. On each side above on the handrail is a board mounted, approximately 5 feet long by 3 feet high, with the legend stating ‘Keep clear of propeller.’

“Q. Now, if I may particularize, we will start from the deck. You say you have a sign board 5 by 3 feet approximately. Does that face outboard? A. Faces outboard, yes.

“Q. On each quarter?

“A. On the quarter, yes.

“Q. And where is it secured—to the railing?

“A. On the railing.

(Deposition of Otto K. Boltz.)

“Q. About what size are each of these letters ‘Keep clear [193] of propeller’?

“A. I would say offhand probably 5 to 6 inches.

“Q. What color is the board?

“A. As a rule the base is white and the color of the lettering is red, to make them stand out.

“Q. At nighttime is any illumination furnished for those boards you have described?

“A. Yes, on that ship they used to put a cluster light there.

“Q. And where is the cluster light placed with respect to the board?

“A. Over the railing shining onto the board.

“Q. You also stated that you had bars which were approximately 9 feet in length?

“A. Yes, sir.

“Q. How far were they lowered down above the water?

“A. I would say offhand they come down to the 30-foot mark level, and I would say they are anywhere from 5 to 6 feet above the water.

“Q. Is the bar colored? A. Yes.

“Q. What colors? A. White and red.

“Q. How are the colors set, varied on the bars, in sequence?

“A. Red, white—red, white. [194]

“Q. Are they divided into 3 feet for each color?

“A. No, on this ship it was more in white stripes, if I recall—red, white—red, white—all the way along the bar.

“Q. Is that laid fore and aft or athwartship?

(Deposition of Otto K. Boltz.)

“A. I am pretty sure about it.

“Q. On the passage from Seattle to Everett did your vessel use her main propelling machinery and steam? A. Yes, sir.

“Q. During the docking maneuver at Everett where were you stationed?

“A. In the engine room.

“Q. In what part of the engine room?

“A. As a rule I am around the maneuvering platform.

“Q. Who else was in the engine room with you?

“A. Mr. Greene and Mr. Pilar.

“Q. What rank did Mr. Greene have?

“A. Mr. Greene was second assistant engineer at that time.

“Q. And Mr. Pilar? [197]

“A. Was the fourth assistant engineer.

“Q. In regular course when in port do you have any other engineers that report for duty?

“A. Yes, sir.

“Q. What are they known as?

“A. Mr. Garner, third assistant engineer, and Mr. Nelson, first assistant engineer.

“Q. I think you misunderstood my question. Do you have any other engineers that report on board for duty who are not regular engineering complement at sea?

“A. Oh, that was Mr. Kane.

“Q. What was his rank?

“A. Night relief engineer.

“Q. Was he a licensed engineer?

(Deposition of Otto K. Boltz.)

“A. Yes, sir.

“Q. Do you know what license he held, and for how long?

“A. Well, he had a chief’s license.

“Q. Was he an older man or a younger man?

“A. He was an older man.

“Q. Where were you when the engine telegraph was rung to finished with engines, as you have previously described, on arrival at Everett?

“A. I was in the engine room.

“Q. And when that telegraph signal was rung, what, if anything, did you do? [198]

“A. Then I left the engine room.

“Q. Before leaving did you give any instructions, or were any necessary?

“A. It was not necessary because after finished with engine is rung, then the main steam stop valves are shut off, closing the steam to the main engine.

“Q. Now, it is not an issue, but if I may lead a bit in the interest of brevity: The main steam turbines of the Cotton State are the horizontal shafts containing blades or buckets against which the steam is forced and the shaft rotates, is that correct? A. Yes.

“Q. Does the steam pass into these turbines at a high temperature? A. Yes, sir.

“Q. When you receive finished with engines as you did on this occasion, what is the regular engineering practice with respect to cooling the turbines?

“A. After the steam is shut off and the steam

(Deposition of Otto K. Boltz.)

lines are drained, the main steam lines are drained, the jacking gear is engaged to cool the steam turbines off, at least for two to three hours.

“Q. And is that necessary or just desirable?

“A. Absolutely necessary due to the high temperature.

“Q. Is it common knowledge among mariners, both engineers [199] and deck men, so far as your knowledge and experience goes, that that fact is known? A. That is correct.”

The Court: Pass that and go down to the question.

(The reading of the deposition of Otto K. Boltz was continued as follows:)

“Q. Why is it necessary to cool down the turbines by continued rotation by a jacking gear?

“A. If it was not done the rotor would probably warp or distort to such an extent that the turbine would not be able to be used the next time.

“Q. What causes that warping?

“A. The heat standing in one position, you know.

“Q. Unevenly distributed?

“A. That's right.

“Q. Will you explain to us what the jacking gear is, as fitted on the Cotton State?

“A. The jacking gear is a machine which is coupled up to the after end of the H P high speed pinion shaft. It consists of a worm gear and is more what we call a planetary gear.

“Q. By what power is the jacking gear driven?

(Deposition of Otto K. Boltz.)

“A. Electric power.

“Q. Electric motor? [200] A. Yes, sir.

“Q. Of what horsepower?

“A. About 7, 10 horse—in this particular case I believe it is 7½ horsepower.

“Q. And what amperage?

“A. The amperage as a rule is around between 35 and 40.

“Q. At what speed on the Cotton State with respect to revolutions of the propeller does the jacking gear turn the propeller?

“A. It takes about between seven and eight minutes to complete, for the propeller to complete one complete revolution.

“Q. How many sets of gearings between the worm drive on the jacking gear and the propeller and shaft itself is the power imparted to before reaching the propeller shaft?

“A. Including the gear and the jacking gear motor and the planetary gear on the high speed pinion shaft and the main turbine would consist of six sets. That is counting that in.

“Q. Six sets of gear through which the power is transmitted before it passes to the propeller shaft? A. Yes.

“Q. What, if any, devices for safety are there on the Cotton State with respect to the jacking gear for the [201] preservation of the reduction gearing?

“A. Every electric motor is fused to a certain amount of amperage in the event of overload that that fuse blow. Also there is an overload protection

(Deposition of Otto K. Boltz.)

device which in the event the motor is subjected to a heavy load, that means if something, great friction, would cause it, or the propeller would come against something, the motor would slow down, and naturally when the motor slows down the amperage would heat by this overload protection device, which consists of a strip of metal, of special alloy, which would expand and in turn trip the breaker.

“Q. The breaker switch?

“A. The breaker switch.

“Q. And what would that do with respect to the current to the motor driving the jacking gear?

“A. The switch would then open and the motor would be stopped.

“Q. On the Cotton State approximately what percentage of resistance would trip the moving contact to cut the current to the jacking gear or break the flow of current to the jacking gear?

“A. It would amount to about 125 per cent overload to activate this overload protection device.

“Q. On January 10, 1957, at Everett, Washington, as you [202] were leaving the engine room were the engineers engaged in doing anything with respect to the jacking gear?

“A. After I left the engine room?

“Q. As you were leaving the engine room.

“A. Yes.

“Q. What were they doing?

“A. Mr. Greene was getting ready to put the jacking gear in.

(Deposition of Otto K. Boltz.)

“Q. That is coupling the worm gearing to the high pinion? A. That is correct.

“Q. In which direction does the jacking gear drive the propeller?

“A. In either direction.

“Q. Ahead or astern?

“A. Ahead or astern, either direction.

“Q. Do you know of your own knowledge in which direction the jacking gear was turned on January 10th?

“A. Yes, in reverse, counterclockwise.

“Q. After you left the engine room on finished with engines, and having seen what you described, where did you go?

“A. I went to my office.

“Q. And where is your office located?

“A. On the first deck above the main deck, the cabin deck.

“Q. And what, if anything, unusual occurred, if at all, when you got up there?

“A. After awhile Mr. Kane came up. [203]

“Q. After about how many minutes, in your best judgment?

“A. That is hard for me to say, I cannot remember the time, it wasn't too long, I know.

“Q. Mr. Kane, the night engineer, came up?

“A. Yes, and said the jacking gear motor stopped.

“Q. Had you seen or heard anything unusual at about that time? A. Not then yet.

(Deposition of Otto K. Boltz.)

“Q. What, if anything, did you then hear or see?

“A. After being notified by the night engineer that the jacking gear motor stopped I told Mr. Greene to go down and have a look at it but not to turn her, to wait until we find out what the trouble seems to be.

“Q. Did Mr. Greene do that? A. Yes, sir.

“Q. And where did you go, if anywhere?

“A. At this particular time there was already a lot of people running around and hollering a barge drifted into the propeller, while I was telling Mr. Greene to go down to the engine room.

“Q. And from what part of the vessel was the hollering coming from?

“A. Well, a lot of people outside, from the outside on the starboard side, and people coming inside and saying a barge drifted in. [204]

“Q. The starboard side was the offshore side?

“A. That is correct.

“Q. What, if anything, did you do then?

“A. Then I went outside.

“Q. Where?

“A. On the starboard side midships.

“Q. What, if anything, did you see and what, if anything, did you do?

“A. I looked over the side and I seen a barge drifting off the stern, more offshore in the line with the stern, and I seen a lot of lumber in the water, a lot of boards floating around.

(Deposition of Otto K. Boltz.)

“Q. When you saw that, what, if anything, did you do?

“A. Well, by that time we knew that the barge had hit the propeller and then the captain, the chief mate and myself went down on the dock to determine how much damage there possibly was done to the propeller.

“Q. Going down on the starboard side what, if anything, did you see with respect to the warning signs you have previously described?

“A. One side of the warning light broke.

“Q. When you went down on the dock what, if anything, did you see?

“A. On the port side the warning light was in perfect order and the red light was flashing. [205]

“Q. Was the fore and aft bar down?

“A. The fore and aft bar was in position.

“Q. And was the notice board you have described lighted up? A. Yes, sir.

“Q. And from the dock what did you see, personally? A. Referring to the light?

“Q. No, referring to the propeller now.

“A. From the dock I seen that the trailing edges on the propeller blades were badly bent.

“Q. How many blades could you see at that time when you first went on the dock?

“A. About one out and one beginning to show.

“Q. Was the jacking gear again in motion?

“A. Then we put the jacking gear and turned the propeller.

“Q. And did you make complete use of the propeller by the jacking gear? A. Yes, sir.

(Deposition of Otto K. Boltz.)

“Q. Who was present then?

“A. The captain, the mate, myself and that’s about all.

“Q. Did you see all four blades?

“A. Yes, sir.

“Q. As they came above the water?

“A. Yes, sir.

“Q. What, if anything, did you observe with respect to those blades in company with the men you have described? [206]

“A. That was Nos. 1, 2 and 3 were badly bent on the trailing edge, and one was completely bent, the tip was bent down towards the hub.

“Q. That is the center of the propeller?

“A. Yes, sir.

“Q. Did you make any entry of the inspection you made in your logbook? A. Yes, sir.

“Q. I show you Exhibit 6. Will you identify for us by reading any entry that you personally made at the time?

“A. (Reading): ‘Propeller warning light and sign in place at 1845 Barge E-15 struck propeller and rudder while being pushed by tug Lea Moe to spot barge No. 25 at No. 5 hatch witness by chief mate’—that is Mr. McLaughlin I am referring to—‘immediate inspection was made by master, chief mate and chief engineer, starboard propeller warning board and light and cluster light broken extent of further damage subject to final survey. O B, chief engineer.’

“Q. Mr. Boltz, after you examined the propeller

(Deposition of Otto K. Boltz.)

you described for us, in company with those gentlemen, from the dock and made the observations you have also described for us, did you go over to the starboard quarter on the deck and examine the red flashing light, cluster light and board? [207]

“A. That is correct.

“Q. What did you personally observe?

“A. Well, that light was—the light bar was hanging down, one rope broken, the forward rope broken.

“Q. What about the red flashing light?

“A. The lights were out.

“Q. How was the connection—did you examine that?

“A. Because the electric cable was pulled out of the plug, was broken. We had to repair that.

“Q. And the cluster light? A. Was out.

“Q. And the warning board? A. Out.

“Q. Do you have any further entries pertaining to what you have described for us in your logbook?

“A. Yes. (Reading): ‘Inspected propeller in presence of Mr. Gallagher A B S, Commander Burgess, United States Coast Guard, captain of the ship and chief engineer, found No. 1, No. 2, No. 3 blades damaged to the extent requiring drydocking of vessel.’

“Q. What does ‘A B S’ stand for?

“A. American Bureau of Shipping.

“Q. Is that the Cotton State’s Classification society? A. Yes, sir.

“Q. From the damage you had seen, in your professional [208] opinion could the vessel have pro-

(Deposition of Otto K. Boltz.)

ceeded on her voyage without drydocking and replacing of the propeller? A. No.

“Q. Did the vessel ultimately go to drydock?

“A. Yes, sir.

“Q. Where did she go to drydock?

“A. Back to Seattle.

“Q. Were you bound for Seattle in regular course or did you put in there specially for drydocking? A. For drydocking.

“Q. With your vessel on drydock did you further inspect the propeller? A. Yes, sir.

“Q. Were photographs taken?

“A. Yes, sir.

“Q. Were you present when the photographs were taken?

“A. Some of them, not all of them.

“Q. I show you a photograph and ask you what it is, from your own knowledge (handing to witness).

“A. That is No. 2 blade.”

The Clerk: Libelant's No. 9.

(A photograph was marked Libelant's Exhibit No. 9 for identification.)

Mr. Howard: The number on that, Mr. Bruff?

The Court: What is the clerk's number? [209]

The Clerk: 9, your Honor.

The Court: Libelant's Exhibit 9 marked for identification. What do you call it, if it has a name?

Mr. Howard: Photograph of No. 2 blade, propeller.

(Deposition of Otto K. Boltz.)

The Court: I have put what is intended to be an up and down double ended arrow marked on one end "Top" and the other "Bottom" so as to indicate. It probably is not done very well. It may be the wrong kind of mark from Counsel's standpoint. If it is, you may disregard it. It is the only way I could tell which way is the top and which is the bottom, from the heads in the lower part of the picture.

Mr. Howard: I think you've just got it reversed, your Honor.

The Court: If you turn it over, you will——

Mr. Howard: Oh. Well——

The Court: Better change it, I think. Mark out the place where I have "Top" and put "Bottom," will you, and put "Top" on the other.

Mr. Howard: All right.

(Mr. Howard writes on Libelant's Exhibit No. 9 for identification.)

Mr. Howard: Would you prefer to have it marked on the front side, your Honor? [210]

The Court: No, it is not necessary.

Mr. Howard: I offer Libelant's Exhibit No. 9.

The Court: Any objection?

Mr. Biele: No objection.

The Court: Admitted.

(Libelant's Exhibit No. 9 for identification was admitted in evidence.)

(Deposition of Otto K. Boltz.)

(The reading of the deposition of Otto K. Boltz was continued as follows:)

“Q. This is blade No. 2, which is numbered on the blade in the photograph? A. Yes, sir.

“Q. I show you another photograph and I ask you if you can identify that as the time and place and what it shows (handing to witness).

“A. This is No. 1 blade, bent downward towards the hub on the starboard side.

“Q. Does that show the damage which you observed? A. Yes, sir.”

The Clerk: Libelant's Exhibit 10.

(A photograph was marked Libelant's Exhibit No. 10 for identification.)

The Court: Which one is damaged, the photo in No. 9 or the photo in No. 10?

Mr. Howard: Your Honor, each of these [211] photos will show a different view of the blade. This is No. 1 blade that is shown on No. 10.

The Court: Is this supposed to be damaged?

Mr. Howard: Yes, your Honor.

The Court: You may proceed.

Mr. Howard: The testimony is, “This is No. 1 blade, bent downward towards the hub on the starboard side.”

The Court: The preceding one was No. 4, was it, or not?

Mr. Howard: No. 2.

(Deposition of Otto K. Boltz.)

(The reading of the deposition of Otto K. Boltz was continued as follows:)

“Q. Does that show the damage which you observed? A. Yes, sir.”

Mr Howard: I offer No. 10.

Mr. Biele: No objection.

The Court: Admitted.

(Libelant's Exhibit No. 10 for identification was admitted in evidence.)

(The reading of the deposition of Otto K. Boltz was continued as follows:)

“Q. I show you another photograph and I ask you what that is (handing to witness).

“A. That is blade No. 3. [212]

“Q. Does that show the damage which you observed on drydock following the incident at Everett? A. Yes, sir.”

The Clerk: It will be Libelant's Exhibit No. 11.

(A photograph was marked Libelant's Exhibit No. 11 for identification.)

Mr. Howard: No. 11 would be Blade 3, your Honor.

The Court: Do you offer it?

Mr. Howard: I offer that, your Honor.

Mr. Biele: No objection.

The Court: Admitted.

(Libelant's Exhibit No. 11 for identification was admitted in evidence.)

(Deposition of Otto K. Boltz.)

(The reading of the deposition of Otto K. Boltz was continued as follows:)

“Q. I show you another photograph and ask you what that is.

“A. That is blade No. 3, I would say—no, it looks like No. 2—trailing edge badly bent.”

The Court: That is the second one of No. 2 then, is that right?

Mr. Howard: Yes, your Honor.

(The reading of the deposition of Otto K. Boltz was continued as follows:) [213]

“Q. Does that also depict the damage you previously described? A. Yes, sir.”

The Clerk: Libelant's Exhibit No. 12.

(A photograph was marked Libelant's Exhibit No. 12 for identification.)

Mr. Howard: I offer No. 12, your Honor.

Mr. Biele: No objection.

The Court: Admitted.

(Libelant's Exhibit No. 12 for identification was admitted in evidence.)

(The reading continued as follows:)

“Q. I show you another photograph and ask you what that is. A. That is No. 2.

“Q. Does that also depict the damage you described for us?”

The Court: How many more of these do you wish?

(Deposition of Otto K. Boltz.)

Mr. Howard: Your Honor, there are three more that are identified.

The Court: All of No. 2?

Mr. Howard: I'll check.

The Court: Blade No. 2?

Mr. Howard: The next two are Blade 2 and the last one is Blade 1.

The Court: Are you sure it is needful to have all of these in? [214]

Mr. Howard: I would like to offer them. I'm willing to have them offered as a group, your Honor, the rest of them.

The Court: Let the last one mentioned be marked No. 13.

The Clerk: Libelant's Exhibit 13.

(A photograph was marked Libelant's Exhibit No. 13 for identification.)

Mr. Howard: Was there a question to me, Mr. Biele?

Mr. Biele: Yes.

(The reading continued as follows:)

"Q. Does that also depict the damage you described for us? A. Yes."

Mr. Howard: I offer No. 13.

Mr. Biele: No objection.

The Court: Admitted.

(Libelant's Exhibit No. 13 for identification was admitted in evidence.)

(The reading continued as follows:)

(Deposition of Otto K. Boltz.)

“Q. You described on Exhibit 13 the photograph showing damaged blade No. 2 taken on the port side. I show you another photograph and ask you what blade that is, and taken on which side?

“A. That was taken from the port side. [215]

“Q. Starboard side or port side? Have another look at it.

“A. No, starboard side, in drydock.”

The Clerk: Libelant's 14.

(A photograph was marked Libelant's Exhibit No. 14 for identification.)

Mr. Howard: I offer No. 14, which is another view of Blade No. 2.

Mr. Biele: No objection.

The Court: Admitted.

(Libelant's Exhibit No. 14 for identification was admitted in evidence.)

(The reading continued as follows:)

“Q. I show you another photograph and ask you what that is?

“A. That is the starboard side, and that is showing No. 1 blade, facing.

“Q. Is No. 1 blade in the vertical position?

“A. Yes, sir—no, horizontal position.

“Q. Which blade is horizontal?

“A. No. 1, facing you.

“Q. What blade is in the vertical position?

“A. No. 2—you can't see No. 3.

(Deposition of Otto K. Boltz.)

“Q. I beg your pardon—vertical lower position is No. 2. What is the vertical upper position?”

“A. No. 4.

“Q. Does that photograph show any damage to No. 4 blade? [216]

“A. Yes, the tip is missing.

“Q. Was there any further damage to that propeller blade as you saw it on drydock following the incident at Everett?”

“A. No, it was the same as leaving Seattle.”

The Clerk: Libelant's Exhibit 15.

(A photograph was marked Libelant's Exhibit No. 15 for identification.)

Mr. Howard: That shows at the top, your Honor, the pre-existing damage to No. 4 blade. I offer that.

The Court: Is No. 15 relating to No. 4 and not No. 1?

Mr. Howard: The witness describes in identification No. 15 the position of Nos. 1, 2 and 4 blades, but particularly No. 4 blade.

The Court: So it relates to 1, 2, 3 and 4?

Mr. Howard: Right.

Mr. Biele: We have no objection to its admission.

Mr. Howard: I offered No. 15.

The Court: It is admitted, No. 15.

(Libelant's Exhibit No. 15 for identification was admitted in evidence.)

(Deposition of Otto K. Boltz.)

(The reading was continued as follows:) [217]

“Q. Now, when the Cotton State arrived at Everett, Washington, as you described for us, and berthed alongside of her pier, is there any different procedure used on the Cotton State with respect to the placement of warning apparatus and lights when you are finished with engines, as distinguished from what would be done to commence the engines or start up the engines again for the resumption of a voyage?

“A. Well, before starting up the jacking gear and getting the engine ready for sea, the bridge is notified and the mate on watch is sent aft to see there is no objects around the propeller, barges, boats or what have you, to see, in other words, that the propeller is clear.

“Q. Even though the signs are up?

“A. That's right.

“Q. When you dock what is done after shutting the steam off the engine?

“A. After shutting the steam off, the mate on watch—which in this case was Mr. McLaughlin, the chief mate. tying up the ship on the afterdeck, hangs over the propeller warning lights and the illumination for the propeller sign. Should be any obstruction there he would notify the engine room, so after when the ship is docked the jacking gear is put in to cool the main engine down for [218] at least two hours or longer.

“Q. How long can you leave the main turbines

(Deposition of Otto K. Boltz.)

at rest after closing off the main steam, without using the jacking gear to rotate the turbines for cooling without damaging the turbine?

“A. I wouldn’t wait more than three to four minutes.

“Q. Is that regular practice? A. Yes, sir.

“Q. Your vessel ultimately went, as you described, to Seattle and drydocked?

“A. Yes, sir.

“Q. Is the time of going onto the drydock and coming off entered in your logbook, Libelant’s Exhibit 6? A. Yes, sir.

“Q. What time did you arrive at the drydock in Seattle, and on what date?

“A. Ship on drydock at 0825.

“Q. What date?

“A. The 12th of January.”

Mr. Howard: Now, Counsel, the next several pages relate to damages. We have now stipulated to damages. I am willing on this examination by me of the witness to skip over the top of Page 34 where the cross-examination begins in the interests of saving time. [219]

The Court: Is that agreeable to you?

Mr. Biele: I’ll just give it a spot check, your Honor. I think it probably is, but just let me check.

(Brief pause.)

Mr. Biele: Cross-examination, your Honor.

Mr. Howard: Page 34.

The Court: You may proceed.

Mr. Biele: The top of Page 34.

The Court: Proceed.

(The reading was continued as follows:)

“Q. Was there any other work done in dry-dock other than what you have told Mr. Gerity?

“A. Not as far as I recall.

“Q. Is it your testimony that Mr. McLaughlin put out the light board and put the cluster light on at the stern of the ship?

“A. In this particular time. But every mate does that whoever is aft.

“Q. Is it your testimony that Mr. McLaughlin did it on this occasion?

“A. At this particular time he was there.

“Q. Did you see him put out the boards?

“A. No.

“Q. Did you see him put out the blinker light you spoke [220] about? A. No, sir.

“Q. Did you see him put the cluster light on?

“A. No, sir.

“Q. As I understand it, blade No. 4 was the same after the accident at Everett as it had been at Seattle?

“A. Yes, sir; we lost that tip.

“Q. But the condition was the same at Everett as at Seattle?

“A. As far as I could see it was.

“Q. When the jacking gear is in operation and you are in the engine room, if there is a strain on the jacking gear can the engineer tell that from any sound?

(Deposition of Otto K. Boltz.)

“A. I wouldn’t say so, because you got a big reduction gear there and that motor keeps on driving this gear and it turns so slowly you have to watch it closely, and if any strain was put on the motor would begin to be overloaded and eventually if the load wasn’t taken off, the overvoltage protection device or a fuse would blow.

“Q. You say the shaft turns very slowly?

“A. Very slowly.

“Q. The engine does not turn very slowly, however, does it?

“A. Well, the only thing that turns fast is the turbine itself—I mean you can see it turning. It is not so that you can see the shaft turn.

“Q. I am speaking about the jacking gear—that turns [221] rapidly, does it?

“A. Yes; it turns fast.

“Q. If there is a strain or overload on the propeller or on the jacking gear, doesn’t the engine start to slow up?

“A. That is something you can’t determine because by that time it is too late because the shaft is barely moving in any event.

“Q. Am I correct then that it is your testimony that if an engineer is in the engine room and the jacking gear is overloaded, that the engine will either kick out of the fuse or on the circuit breaker?

“A. On the overload device.

“Q. On the overload device, before the engineer could stop it?

“A. Well, the men don’t stay right by the jack-

(Deposition of Otto K. Boltz.)

ing gear because they have other duties to perform. You don't have a man standing by there, that is not the practice that a man stands right by the jacking gear.

"Q. If a man was standing by the jacking gear, can he turn it off before it would kick out?

"A. No; in this particular instance he would have to run over to the starting box, which was not by the engine on this particular ship.

"Q. When you were testifying about the various warning [222] devices as to the propeller, and referring to them as on the hull, they are not kept in position when the ship is under way, are they?

"A. Oh, no.

"Q. So on your voyage from Seattle to Everett they would not be over the side, is that correct?

"A. That's correct, you have nothing over the side when you are under way.

"Q. And it was only when you got to Everett, Washington, that they would be put over the side, is that correct? A. That's correct.

"Q. When I am talking about this I am talking about all these warning devices.

"A. That's correct.

"Mr. Gerity: Every single one of them?

"Q. Every single one of them, is that right?

"A. That's correct.

"Q. In your testimony and in your logbook you have spoken about the warning board being put over the side, is that right? A. Yes.

(Deposition of Otto K. Boltz.)

“Q. You have testified you did not put it over yourself?

“A. No; it isn't my business to put them over.

“Q. And you didn't? A. No. [223]

“Q. And, as I understood your testimony, you were not back to the stern of the ship until after the jacking gear had kicked out, is that right?

“A. That is what I have stated.

“Q. So you have no personal knowledge yourself whether that warning board was over or not prior to the accident?

“A. That is correct.

“Q. And you have no personal knowledge as to whether the blinking light was blinking prior to the accident? A. That is correct, too.

“Q. And you have no personal knowledge whether the cluster light was on prior to the accident? A. That's right.

“Q. In other words, you have no personal knowledge about any of these warning devices?

“A. No; I never claimed to have.

“Q. I just want to make it clear.

“Mr. Gerity: You are now speaking of before the accident?

“Q. I am speaking of prior to the accident.

“A. After docking?

“Q. Yes, but prior to the accident?

“A. That is correct.

“Q. I notice in your log, Libelant's Exhibit 6, that although you have described an inspection of the [224] propeller at Seattle and have described

(Deposition of Otto K. Boltz.)

some damage to blade No. 4, you have not indicated the extent of that damage, is that right?

“A. That’s right—where is that? (Referring to log.) Well, here, the blade tip missing (indicating).

“Q. Now, is my recollection correct that you estimated there was 4 to 6 inches of the blade missing?

“A. Yes—well, that is not only my estimation, it is the other people’s, too, that was with me.

“Q. When you made that inspection where were you and the other people?

“A. On the dock. That is the only time we can do it when we make our regular inspection. The propeller is always”——

Mr. Howard: I think the word should be “viewed.”

“A. ——the dock, the stern is always off the dock. For any person to say definitely a fixed measurement is always approximate because you are anywhere from 10 to 15 feet away in a lot of cases.”

The Court: Just a moment. Right there on Page 38, the third line from the bottom, do you agree that inadvertently there is omitted “viewed from”? Do you agree?

Mr. Biele: Your Honor, I have no—let me [225] see here a minute.

The Court: Mr. Howard says that is an obvious omission.

Mr. Biele: I can’t agree to that, your Honor. That’s just the way I received it and there has been no correction made on that.

(Deposition of Otto K. Boltz.)

Mr. Howard: I believe——

The Court: You may proceed.

Mr. Howard: I wrote Mr. Biele a letter outlining these corrections which should be made and received no response.

Mr. Biele: There is no correction on Page 38, your Honor. I refer to your letter.

The Court: Proceed. Page 39.

(The reading was continued as follows:)

“Q. And the captain and chief mate were also standing on the dock? A. That’s correct.

“Q. Now, if the extent of the missing portion of the propeller blade had been 14 or 16 inches, would that have required repairs before setting out on a sea voyage? A. I wouldn’t say no.

“Q. Do you know what the beam of the Cotton State is?

“A. Yes; something between 62—something like that, I will [226] say offhand.

“Q. And when you speak of the diameter of the propeller as 19 feet 6 inches, that is from the tip of one blade all the way through the center and to the tip of the other blade?

“A. That is correct.

“Q. Do you know what the length of the Cotton State is?

“A. Well, it is 450 feet, something like that.

“Q. Do you recall how far it was from the forward part of the house to the stern on the Cotton State?

(Deposition of Otto K. Boltz.)

“A. Well, as a rule the midship house is always placed closely to the center line of the ship not quite—but a rough guess I would say maybe 200 feet.

“Q. Are you speaking from the after part of the house or the forward part?

“A. I am speaking of the fore part where the door comes out of the deck, it being only one door in the midship house on the Cotton State.

“Q. Referring again to Exhibit 6, and particularly to the entry commencing 1545, when did you insert that entry in your logbook?

“A. Soon after the inspection—that is what we do.

“Q. Do you remember on this day when you did it?

“A. Well, we always go on the dock, that is the standard procedure, that is what we have to do, that is a company [227] ruling, we have to inspect the propeller leaving and coming in, going out and coming in.

“Q. I am asking you when you made the entry?

“A. I have to refer to the book.

“Q. Referring to the book can you tell me when you put this entry, 1545, in the book?

“A. (Referring to book): It was the day we inspected it.

“Q. What time of the day, if you remember?

“A. Well, right after docking.

“Q. No, Chief. You say you made the entry after docking?

(Deposition of Otto K. Boltz.)

“A. Yes; when we go on the dock when the mate is finished with engines, then the mate and myself go on the dock and they put it in the deck log and I put it in the engine log.

“Mr. Gerity: I suggest that the log be shown to the witness. He is asking you, when was that entry physically written in the book, and in what port?

“The Witness: That was in Everett, Washington.

“Mr. Gerity: 1545?

“The Witness: No; that was in Seattle, wasn't it?

“Mr. Gerity: That is what he is asking you.

“Q. When did you make that, in Seattle?

“A. Soon after inspection. We always make the inspection [228] just before departure, as a rule anywhere from thirty minutes to an hour.

“Q. After you made that inspection did you go to your room or did you go down to the engine room to get ready to get under way?

“A. As a rule when standby is rung and the ship leaves the dock, then I always go in the engine room, docking and undocking. That is a standard procedure for the chief engineer.

“Q. When was standby engine on January 10, 1957? A. Standby was rung at 1557.

“Q. Well, now, when standby was rung did you go to the engine room on this particular day?

“A. Yes; I am sure I did.

(Deposition of Otto K. Boltz.)

“Q. How would you know that standby was rung?

“A. Because the telegraph shows you standby.

“Q. You have a telegraph in your room?

“A. No, but the engineer on watch always notifies me when the telegraph is on standby.

“Q. So on this day the engineer notified you when standby was rung?

“A. They always do, yes.

“Q. And at 1557 it is your recollection you went down below? A. That is the official time.

“Q. And that is your recollection as to when you went below? [229] A. That's right.

“Q. And did you put this entry, 1545?

“A. It must be, it is my handwriting.

“Q. Did you put this entry in the log before you went to the engine room at 1557, or did you put that in after you had come up from the engine room?

“A. No; I must have put it before in, because I can't put it in after, because the inspection takes place whenever the gangway is in.

“Q. I am not referring to when you made the inspection. I am referring to when you wrote that in the book.

“A. I can't remember that; I won't state no definite time.

“Q. Referring to the same logbook—and I am referring to the entry on the side of the page, 'Propeller warning light,' and so forth, when did you put that entry in the log?

(Deposition of Otto K. Boltz.)

“A. The moment after we examined the accident to the propeller I wrote it in. That was after the accident happened.

“Q. If I express it correctly, I think you mean you went down and looked at the propeller from the dock? A. Definitely.

“Q. And then you went to the stern of the ship?

“A. Right.

“Q. And then you went and made that entry in the logbook, [230] is that correct?

“A. That is correct.

“Q. And in the interim you had discussed this matter with the other members of the ship's personnel?

“A. No; I did not discuss it with the other members of the ship's personnel, because there was a night engineer there, and I don't discuss things with the fireman and oiler.

“Q. Referring to that entry, and particularly the first part of it, 'Propeller warning light and sign in place'—— A. That is correct.

“Q. Now, you don't know whether the propeller warning lights and signs were in place prior to the accident or not, do you? A. Yes.

“Q. Did you put it in place? A. No.

“Q. And you did not see it in place?

“A. No.

“Q. And you say you know it was because someone told you it was?

“A. Yes, because every watch inspects the propeller sign on that particular ship, we had a ruling that every watch looks at the propeller sign and

(Deposition of Otto K. Boltz.)

sees it is in [231] place, and it is logged in the rough engine room log.

“Q. When you say on every watch, you mean by someone in the engine room?

“A. That’s right. Even Mr. Kane wrote it in his hand. It is always in the logbook—that is why I know it was in place.

“Q. Will you show me in the logbook any place where the engineer inspects the warning lights prior to the accident?

“A. That I don’t know, but the engineer logged it.

“Q. Will you show me any place where it is logged?

“A. I never claimed that; I just said it is inspected and the engineer logged it, and when he logs it he must be satisfied that the light is in place.

“Q. Please look at the Exhibit 6 and show me any place where there is any entry by an engineer showing the lights were in position prior to the accident.”

The Court: Can you not skip down to the answer?

(The reading continued as follows:)

“A. All right, January 10th is signed here by Mr. Kane (referring to logbook): ‘Red light and warning sign in place on the stern.’ Signed by Mr. Thomas Kane.

“Q. Referring to the time of that entry, isn’t

(Deposition of Otto K. Boltz.)

it correct that that entry is shown at 10:00 p.m.? [232]

“A. Well, of course, we had it all repaired, we repaired the light and put it back in service again.

“Q. What I would like you to do, Chief, is to point out any entry in Exhibit 6 showing that any engineer logged that that light was out prior to the accident?

“Mr. Gerity: The light was out?

“Mr. Hanrahan: The light was in position.

“A. That is something I don't know, because it is little things, you know, because the light—I don't write this logbook, that is not the engineer supposed to write. It must be in the deck log for sure because that is the people that put the bar over. (Indicating in logbook.)”

The Court: I think he will stop here. There are twenty or so more pages to read. Be sure to remind me of this Friday.

Mr. Howard: It is Page 46, your Honor.

The Court: Page 46.

Mr. Howard: At the top.

The Court: All those connected with this case are excused until Friday morning, day after tomorrow, at 10:00 o'clock in the forenoon.

(Thereupon, at 4:50 o'clock p.m., a recess herein was taken until 10:00 o'clock a.m., Friday, November 28, 1958.) [233]

November 28, 1958—10:05 o'Clock A.M.

(All parties present as before.)

The Court: I wish to speak to Counsel about one or two matters before we proceed. I have been very fortunate in having a convenient time to consider your trial briefs and the pretrial order since we last were working in open court, and I notice a supplemental memorandum consisting of three numbered pages which I have not read just now filed, but I want to ask each side if you have undertaken to find and have not any authorities, either statutes or court decisions, on the question of the right of the owner of the tow to receive relief or as to the duty of that owner as the same may be affected by the negligence or non-negligence of the tug towing that tow.

I do not see any authorities cited by either of you on that question and maybe you do not in fact raise that question—no, I will take that back. Mr. Biele has raised it in his stated comments which I would interpret as argument in his trial brief, but I do not recall his citing any comparable decisions on the matter at all.

Mr. Howard, do you intend any of these authorities cited in your trial brief to throw any [234] light on that question? I did not see any of them appearing to be so, nor do I see any raising any question about that especially.

Is there any contention between these litigants, any of them, as to whether or not, irrespective of the lawful right of the tug. that the owner of the

tow is not in any way affected by that, taking in that connection the point of view, if it does—I am just inquiring—that the tow is an independent entity and not without restriction of its rights by the negligence of the tug nor without in any way having its duties in the matter depend upon the fault or nonfault of the tug? Do you raise any question about that?

Mr. Howard: Well, your Honor, it is our position that, having sued both the tug and the barge to recover for the damages to the vessel, that now that there is a cross-libel filed which cross-libel is asserted by attorneys representing both the tug and barge interests, that is Mr. Biele and Mr. Crutcher, that all issues are submitted to your Honor; that is, whether there is fault of the barge, whether there is fault of the tug, whether there is fault of the ship, and that the determination of the liability would be complete as between all three parties. It is true that the cross-libel which was asserted by the barge [235] was asserted against the ship only, but I think that is for obvious reasons because the same attorneys that represent the barge also represent the tug and they are certainly not going to cross-libel against their own interests.

The Court: That may well be, but the Court has to look at the litigant and not Counsel. That might be subject to a humorous comment but maybe I better not indulge that. The Court has to look at the rights of the litigants always and not as limited too much by such trial procedures as the

rules and laws of evidence and things like that may otherwise provide.

Mr. Howard: If there is any question in the Court's mind about that we ask leave at this time to amend.

The Court: Mr. Howard——

Mr. Howard: To assert a cross-claim against the tug for any liability which we might have to the barge interests, but we are all in the case already.

The Court: I am not talking about the trouble of the Court raising questions Counsel are not interested in and I am not talking about questions so raised and the Court's trouble with them. I am trying to find out what you are raising in that respect, if anything. I do not know what your position is because I have not [236] seen it and I do not know whether you are ever going to have a position on it or not. Maybe you would rather not say. Maybe you do not want to say anything until you get up to the appellate court, I do not know. The Court has no right to require it that I know of, and I just want to know what it is at this time, your attitude on that.

Mr. Howard: Well, our attitude, your Honor, is simply this. that all parties are before the Court and all claims are before the Court, and if there were basis for the Court to find mutual fault or fault on the part of more than one of the parties, then there would be a division of the damages in accordance with the mutual fault doctrine.

The Court: Do you intend to try to help the

Court solve that question, or do you not? I will put it that way.

Mr. Howard: I'll do anything I can to help the Court solve it, your Honor.

The Court: It may be that your position calls for you not doing so. I do not find any cases cited by you for that specific purpose. You may later claim that some of them do involve information or rulings upon this question that I asked you do you raise. I do not know, but I do not see anything in your brief said [237] about the question at all. Do you intend to? Have I overlooked it?

Mr. Howard: Well, your Honor, we intended to submit the case on the basis of the issues in the pretrial order which I have set forth here, and I'd like to refer to those, if I may.

The Court: I am really not concerned about the others now, because that involves argument and taking up time explaining your whole position in the case. I am not interested in that. You have already made your opening statement. Since the evidence has gotten to this stage in connection with the libelant's case in chief, I just merely want to ask you now, have you intended to raise that question?

Mr. Howard: Yes, your Honor. It is raised, I believe, by our last issue of law.

The Court: State it.

Mr. Howard: "Should the cross-libelant recover the full amount of its damages from the libelant and cross-respondent?"

The Court: Yes. I am talking about your brief.

Have you given any attention to it in your brief or intended that your brief be so regarded?

Mr. Howard: Only to the extent that the brief does contain one or two cases including a case [238] from the Supreme Court of the United States where in a similar situation the Court held both the owner of the tug and the owner of the barge at fault in a case where the barge did not carry proper lights.

The Court: But it did not say that the barge could not have been held so unless the tug was held so and it did not hold that the barge was liable even though the tug was not or that the owner of the barge could recover for its losses even though its tug was the most negligent actor in the transaction that was the accident. It does not say anything like that. That is what is here the subject of inquiry.

Is there any right which may be lurking in the record or right out in plain open view, as you said is true as to the contentions but not as to your brief? Do you contend that if the tug was negligent the law presumes or imputes to the barge owner that it also was negligent on the doctrine of agency or some other doctrine and therefore that the owner of the tow or barge cannot recover against the owner of the tug if the Court should find and conclude that the tug was negligent in some way?

Mr. Howard: Not at all, your Honor. We contend that the owner of the barge can recover against the tug if the tug is negligent. [239]

The Court: No; I am not asking about recovery against the tug. Against the libelant.

Mr. Howard: I misunderstood your Honor.

The Court: I probably did misspeak myself. I understand the owner of the barge asks for its damages against the libelant.

Mr. Howard: Well, we contend, your Honor——

The Court: It does not ask any damages against the tug, as you pointed out a moment ago.

Mr. Howard: We contend that if on the claim of the barge to recover its damages, if it should be found by the Court that both the tug and the ship, the Cotton State, were at fault and that fault was the proximate cause of the accident, then there would be a division of the damages.

The Court: Do you intend that some case that you have in your trial brief shall be authority for your position on that point? That is the real question that I ask you.

Mr. Howard: I don't believe I have a case in my brief on that, but I would like to reserve the right to try and——

The Court: I did not see any statement in your brief that you were treating of that subject at all. I wish you would do that. [240]

Mr. Howard: I will as soon as I can, your Honor.

The Court: Now, I would like to know what your cases are, Mr. Biele, that support your position which you stated in your brief that the owner of the barge was not to blame here and, therefore, there is no reason why it should not, no matter

about the tug, recover against the libelant for its sustained damages even if the tug was negligent as stated by libelant.

Mr. Biele: Your Honor, our position is that the tug was towing a dumb tow in this case and that the tug, or the tow and the tug's owner were completely innocent of any wrongdoing.

In the event that the Court should find that there was fault on the tug, that would allow the scow owner to recover from the tug or the tug's owner.

In the event that the Court should find that there was negligence on the part of the ship, the scow owner could recover from the ship.

In the event that the Court should find that there was negligence on both the tug and the ship, the scow could then recover from both under the mutual—both the ship and the tug would pay half the damages under the mutual fault doctrine.

The Court: Have you cited any authority [241] for any of those propositions? What the Court is trying to find out from you, you may just forget everything except this: Supposing the tug was the only actor that was negligent in this case. Then obviously the owner of the barge would not have any right of action against anybody, would he?

Mr. Biele: I think he would have an action against the tug, your Honor, if the tug were negligent alone. If the ship were negligent alone, it would have an action against the ship alone.

The Court: Very well, then that is the answer to the Court's last stated question. But suppose

the ship were not negligent and the tug was. Would it have an action against its own agent, the tug?

Mr. Biele: Under these circumstances, your Honor?

The Court: Yes. I don't mean these circumstances any more than——

Mr. Biele: The Court would have to find fault on the tug in some way. If there was no fault on the tug there would be no recovery against the tug, but if the Court were to find that there was some negligence on the part——

The Court: Suppose both the tug and the moored ship were negligent, were mutually at fault; [242] would the owner of the barge or the tow have a right of action against each without any diminution in respect to its right of action against the moored ship on account of any negligence of its tug?

Mr. Biele: Yes, your Honor, it would, and under the mutual fault doctrine the ship and the tug then would have to——

The Court: With respect to the question of the negligence of the tug and what effect it has upon the right of the barge owner, is this a case of imputed negligence generally?

Mr. Biele: No, your Honor.

The Court: From principal to agent or from agent to principal?

Mr. Biele: I don't think so, your Honor, no.

The Court: Have you anything in your brief to support your thought on that matter?

Mr. Biele: I think my last conclusions——

The Court: That is your stated conclusion?

Mr. Biele: Yes, your Honor.

The Court: I am aware of that and I am trying to find out, is there any case in your brief or do you know of any or do you intend to let the Court have the benefit of any which supports that contention on your part? That is what I am trying to bring to your [243] attention at this stage to let you know that I am interested in what effect the tug's negligence, if the Court should find there was any, has on the right of the barge to recover in this case against somebody? That is what I want to know.

Mr. Biele: Your Honor, I think I have a case or two in mind. I don't have the citations in mind but I think I can probably get those to your Honor on that point.

The Court: Then let us leave this subject. There is another subject.

Mr. Howard: May I just have one word there, your Honor? I would like to say that I agree with the propositions which Mr. Biele stated to your Honor as far as his contentions are concerned.

The Court: Let me have some authorities on the right and the duty of that barge with respect to each and all the issues in this case.

Mr. Howard: Very well, your Honor.

The Court: The other question is addressed principally to Mr. Howard. I have noted your old cases in 54 and 52 of Federal Reporter, and I find that the one in 54 on which you seem to heavily rely did not, according to my understanding of the

report of that case, involve a situation as to the lines of the moored [244] ship being put out to the moving vessel, that is the position of those lines as they were in in the case at bar.

In the cited case, the City of New York case, decided in 1893 in the Second Circuit and reported in Volume 54 of Federal Reporter beginning at Page 181, from the syllabus in particular it appears that the lines from the moored ship to the moving tug had not been made fast onto the tug and that the tug in all respects was free and moving so far as any physical control from the ship was concerned. Now that does not prove a thing here, does it, because these lines were fixed?

Mr. Howard: Well, it doesn't prove a thing on the line, your Honor, but it does prove a lot as far as the position that the tug took.

The Court: The rest of it may be fine and dandy, but I want to know if you have any case or expect to let the Court have any where we have a factual situation respecting the putting out by the moored vessel of the lines already and tying them up on the tug or the barge already before the accident happened had upon the fault or negligence of the so-called moving vessel. That is what I wish to know, and any light you can give the Court now or hereafter I would need very [245] badly, Mr. Howard.

Mr. Howard: I would like to call your Honor's attention to the Hektor case cited on Page 9 of the brief.

The Court: What is the citation of it? Give me the volume and page number.

Mr. Howard: It's in 1935, A. M. C. 336.

The Court: Can you give it to me in the Federal, please?

Mr. Howard: I'm sorry, your Honor, it is not published in the Federal Reporter.

The Court: I have the A. M. C. but I do not like to read it because it is very hard to read.

Mr. Howard: Well, I've looked for this case in the Federal and it's not published in the Federal, but it is in the——

The Court: 1935?

Mr. Howard: 1935 A. M. C. 336.

The Court: 336, Hektor, is that right?

Mr. Howard: Yes, your Honor.

The Court: What do you state as to the lines?

Mr. Howard: In that case, if my recollection serves me correctly, the scow or barge in that case was secured by lines to the ship at the time the accident happened. [246]

The Court: That might be of great help, much more than the 54 Federal 181 case.

Mr. Howard: And there may be others. I'm just scanning through here now to see if I can locate any others of that type. I believe that the case in 52 Federal at the bottom of Page 11 of the brief——

The Court: I have it. Do you have it with you?

Mr. Howard: I don't have it with me, no, your Honor.

The Court: Page 1 what?

Mr. Howard: 174.

